TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 109.

COMMERCIAL NATIONAL BANK OF PORTLAND, PLAINTIFF IN ERROR,

vs.

HENRY WEINHARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED AUGUST 9, 1902.

(16,040.)

(18,640.)

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a In the Supreme Court of the State of Oregon, *ss:*

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Defendant and Appellant.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the above entitled cause, with all things concerning the same.

July 22nd, 1902.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

b In the Supreme Court of the United States.

COMMERCIAL NATIONAL BANK OF PORTLAND, Plaintiff in Error,
vs.
HENRY WEINHARD, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Oregon before you or some of you, being the highest court of said State in which a decision could be had in the said action between Henry Weinhard, plaintiff and respondent, and defendant in error, and The Commercial National Bank of Portland, a corporation, defendant and appellant, and plaintiff in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege and exemption specially set up and claimed under such statute; a manifest error hath happened to the great damage of the said Commercial National Bank of Portland, plaintiff in error, as by its complaint appears; and we being willing that error if any hath been, should be duly corrected, and full and speedy justice
c done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington, within sixty days

from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of June, 1902

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States for the District of Oregon,
By G. H. MARSH,
Deputy Clerk.

Allowed by
R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

d STATE OF OREGON, *County of Multnomah,* } ss:

Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Portland, Oregon, this 26th day of June, 1902.

THOS. O'DAY,
Of Attorneys for Defendant in Error, Henry Weinhard.

STATE OF OREGON, *County of Marion,* } ss:

Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Salem, Oregon, this 25th day of June, 1902.

J. J. MURPHY,
Clerk of the Supreme Court of Oregon.

e [Endorsed:] No. —. In the Supreme Court of the United States Commercial National Bank of Portland, plaintiff in error, *vs.* Henry Weinhard defendant in error. Writ of error. Filed June 27 1902 J. J. Murphy, clerk. By —— ——, deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for plaintiff in error.

f In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
THE COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.
} Petition for Writ of Error.

To the Honorable Robert S. Bean, chief justice of the supreme court of the State of Oregon:

And now comes the Commercial National Bank of Portland, a corporation, appellant, by Harrison G. Platt and Robert T. Platt and E. S. Pillsbury, its attorneys, and says that on or about the 3d day of May 1902, the said supreme court of the State of Oregon rendered a judgment in the above entitled cause in favor of the above named plaintiff and respondent and against defendant and appellant, as will appear by reference to the record and proceedings in said cause, in which judgment and decision and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of defendant and appellant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, defendants prays that a writ of error issue in this behalf returnable into the Supreme Court of the United States for the correction of error complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

E. S. PILLSBURY,
HARRISON G. PLATT,
ROBERT T. PLATT,
Attorneys for Petitioner.

g [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard plaintiff & respondent *vs.* Commercial National Bank of Portland, defendant & appellant Petition for writ of error. Filed June 25 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

h In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.

Order Allowing Writ of Error.

This 25th day of June, 1902, came the defendant and appellant by its attorneys Harrison G. Platt and Robert T. Platt and E. S. Pillsbury, and filed herein and presented to the court its petition

praying for the allowance of a writ of error intended to be urged by it, praying also that transcript of the record and proceedings and papers upon which the decision and judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the said writ is hereby allowed upon the said appellant giving bonds according to law in the sum of $500.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

i [Endorsed:] No. —. In the supreme court of the State of Oregon. Henry Weinhard, plaintiff & respondent, *vs.* Commercial National Bank of Portland, defendant & appellant. Order allowing writ of error. Filed June 25 1902 J. J. Murphy clerk. By —— ——, deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon, attorneys for defendant.

j In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.

Know all men by these presents: That Commercial National Bank of Portland, the plaintiff in error in the above entitled cause on writ of error to the Supreme Court of the United States, as principal, and R. Lea Barnes, and John E. Miles, as sureties, are held and firmly bound unto Henry Weinhard, plaintiff and respondent in the supreme court of the State of Oregon and defendant in error on writ of error to the Supreme Court of the United States, in the full sum of five hundred dollars ($500.00) to be paid to the said Henry Weinhard, his certain attorneys, executors, administrators, and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of June, 1902.

Whereas lately, at a session of the supreme court of the State of Oregon, in an action pending in said court between Henry Weinhard, plaintiff and respondent, and Commercial National Bank of Portland, defendant and appellant, a final judgment was rendered against the said Commercial National Bank of Portland, and the said Commercial National Bank of Portland having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of said supreme court of the
k State of Oregon to reverse the judgment in the aforesaid action, and a citation directed to said plaintiff and respondent, citing and admonishing him to be and appear at a session of the Supreme Court of the United States at Washington, within sixty days from the date hereof;

Now, therefore, the condition of this obligation is such, that if the said Commercial National Bank of Portland, plaintiff in error, shall prosecute said writ of error to effect, and answer all costs if it shall fail to make its said plea good, then this obligation to be void, else to remain in full force and virtue.

COMMERCIAL NATIONAL BANK
OF PORTLAND,
By HARRISON G. PLATT, *Attorney.*
R. LEA BARNES. [SEAL.]
JNO. E. MILES. [SEAL.]

Signed, sealed and delivered in presence of
HARRISON G. PLATT.

l STATE OF OREGON, }
County of Multnomah, } ss:

I, R. Lea Barnes, and I, John E. Miles, whose names are subscribed to the within undertaking as sureties, being duly sworn, each for himself, say:

That I am a resident and freeholder within the State of Oregon, and not an attorney or counselor at law, sheriff clerk or officer of any court, and am worth the sum of five hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

R. LEA BARNES.
JNO. E. MILES.

Subscribed and sworn to before me this 25th day of June, 1902.

[Seal of Harrison G. Platt, Notary Public, State of Oregon.]

HARRISON G. PLATT.
Notary Public for Oregon.

Approved June 25, 1902.

By R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

m [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard plaintiff & respondent *vs.* Commercial National Bank of Portland defendant & appellant Undertaking Filed June 25th 1902 J. J. Murphy, clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

n In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff & Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant.

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

Now at this time comes The Commercial National Bank of Portland, defendant and appellant in the above entitled case, and plaintiff in error to the Supreme Court of the United States, by its attorneys Harrison G. Platt and Robert T. Platt and E. S. Pillsbury, and presents the following assignment of errors and prayer for reversal of the decision in the above entitled case in this court, by the Supreme Court of the United States:

First. The supreme court of the State of Oregon erred in holding the complaint herein good as against the demurrer thereto of defendant and in not sustaining said demurrer.

Second. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to defendant's first, further and separate answer.

Third. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to the second, further and separate answer of defendant.

Fourth. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to the third, further and separate answer of defendant.

o Fifth. The supreme court of the State of Oregon erred in denying defendant's motion for a non-suit.

Sixth. The supreme court of the State of Oregon erred in holding that section 5205 Revised Statutes of the United States did not give defendant the right by action of its board of directors to levy an assessment to restore impaired capital stock.

Seventh. The supreme court of the State of Oregon erred in holding that the acts and proceedings of defendant in assessing the stock of plaintiff were not authorized by section 5205 United States Revised Statutes.

Eighth. The supreme court of the State of Oregon erred in holding that the acts and proceedings of defendant in selling the stock of plaintiff were not authorized by section 5205 United States Revised Statutes.

Ninth. The supreme court of the State of Oregon erred in holding that the assessment levied by the board of directors of defendant bank to make up the impairment in its capital stock under section 5205 United States Revised Statutes, was invalid and not within the power of the directors.

Tenth. The supreme court of the State of Oregon erred in hold-

ing that defendant bank wrongfully converted plaintiff's shares of stock.

Eleventh. The supreme court of the State of Oregon erred in awarding judgment in favor of plaintiff and against defendant
p and in not awarding judgment against plaintiff and in favor of defendant.

And by reason of the foregoing errors and holdings the appellant prays that said judgment may be reversed and that a mandate be entered directing that a judgment be entered in favor of defendant and plaintiff in error for its costs and disbursements and that it may be restored to all things which it has lost by reason of said judgment.

E. S. PILLSBURY,
HARRISON G. PLATT,
ROBERT T. PLATT,
Attorneys for Commercial National Bank of Portland, Oregon, Defendant and Appellant and Plaintiff in Error.

q [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard plaintiff & respondent *vs.* Commercial National Bank of Portland defendant & appellant Assignment of errors. Filed June 25th 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

r In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff & Respondent and Defendant in Error,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant and Plaintiff in Error.

UNITED STATES OF AMERICA, *District of Oregon*, } *ss*:

To Henry Weinhard, plaintiff and defendant in error, and to Thomas O'Day and L. H. Tarpley, your attorneys, Greeting:

Whereas, the Commercial National Bank of Portland, a corporation, has lately obtained a writ of error to the Supreme Court of the United States from a judgment rendered in the supreme court of the State of Oregon, in your favor and has given the security required by law, you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to said writ of error, wherein said Commercial National Bank of Portland is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ

of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert S. Bean, chief justice of the supreme court of the State of Oregon this 25th day of June, 1902.

[Seal Supreme Court, State of Oregon.]

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

Attest: J. J. MURPHY, *Clerk.*

s UNITED STATES OF AMERICA, } ss:
District of Oregon, }

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 26th day of June, 1902.

THOS. O'DAY,
Of Attorneys for Plaintiff & Respondent, Henry Weinhard.

t [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard, plaintiff & respondent, *vs.* Commercial National Bank of Portland, defendant & appellant Citation Filed June 27 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

u *Transcript.*

HENRY WEINHARD, Plaintiff & Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant.

Appeal from the circuit court, Multnomah county.

Before Hon. Alfred F. Sears, Jr., and Hon. Arthur L. Frazer, judges, sitting in joint session.

O'Day and Tarpley, attorneys for respondent.
E. S. Pillsbury and Platt & Platt, attorneys for appellant.

1 Be it remembered, that heretofore and on the 23rd day of February, A. D. 1899, there was filed in the office of the clerk of the circuit court for the county of Multnomah, a

Complaint

which is in words and figures as follows, to-wit:—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department #—.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

The plaintiff complains of defendant and for cause of action alleges:—

That at all the times hereinafter stated the defendant was and still is a corporation, duly incorporated under the national banking laws of the United States and located at Portland, Oregon, engaged in a general banking business.

That for a long time before and until the time hereinafter mentioned, the plaintiff was lawfully possessed and was the owner of 100 shares of the capital stock of said defendant corporation, fully paid up, of the aggregate par value of $10,000.00.

2 That on or about October 5th, 1896, the board of directors of said bank, without any lawful authority therefor, adopted a series of resolutions recommending and requesting the Comptroller of the Currency to call for an assessment of 50 % on the capital stock of said bank, in accordance with the authority conferred upon him by sec. 5205 of the Revised Statutes of the United States, claiming that the capital stock of said bank had been impaired, and afterwards, on or about December 5, 1896, the Comptroller of the Currency, in compliance with the said request of said board of directors gave notice to the defendant association, that its capital stock had become impaired to an extent which made necessary an assessment thereon of $250,000.00 that being 50 % assessment on the face value of the capital stock of said defendant.

That thereafter and subsequent to the receipt of said notice, the board of directors of the defendant corporation, without any lawful authority therefor, passed a resolution as follows:—

"In accordance with the notice served upon this association, by the Comptroller of the Currency under date of December, 1896, an assessment is hereby levied upon the shareholders of this bank of 50 % or $50. per share payable at this bank on or before March 11th, 1897." And further resolved, "That the cashier of this bank be, and he is hereby authorized and instructed to serve upon each shareholder of the bank, a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail."

3 That the above resolution and all and each and every act of said board of directors was done without the authorization or direction of the stockholders of said bank, and no shareholders' or stockholders' meeting was held for the purpose of authorizing said assessment or determining what action, if any, should be taken with reference to the said notice for assessment, given by the Comptroller of the Currency as aforesaid.

That the amount of the assessment of the stock of this plaintiff, made by the board of directors as above set forth, was the sum of $5,000.00 and that thereafter, to-wit:—on or about the 5th day of May, 1897, said defendant association without lawful authority therefor, undertook to and did sell and dispose of said plaintiff's 100 shares of the capital stock of defendant for the purpose of paying said pretended and illegal assessment, this plaintiff having refused to pay the same, and denying the authority of said board of directors to levy said assessment; and this plaintiff alleges that under sec. 5205 of the Revised Statutes of the United States, the board of directors of said defendant had no authority or right to make said assessment on the stock or shares of this plaintiff, but said assessment could only be made by order of the shareholders of defendant at a shareholder's meeting and not otherwise and that said assessment is void.

That notwithstanding the premises and the want of authority on the part of said board to make said assessment and sale, said defendant proceeded to and did advertise and sell said 100
4 shares of stock of this plaintiff as hereinbefore stated, and did thereby convert same to the use and benefit of the defendant and did thereby unlawfully and without the consent of this plaintiff deprive the plaintiff of the use and possession of said stock and the proceeds thereof, and did thereby oust said plaintiff as a shareholder or stockholder of said defendant association to his damage in the sum of $10,000; that said sum of $10,000.00 was the reasonable value of said stock at the time of said wrongful sale and conversion by said defendant.

That by virtue of the wrongful act of said defendant association, this plaintiff ceased to be a shareholder in said bank, and ceased thereafter to participate in the profits and emoluments of said defendant.

Wherefore plaintiff prays judgment against said defendant for the sum of $10,000.00 with interest thereon from May 5, 1897, together with his costs and disbursements herein.

O'DAY AND TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } ss:

I, Henry Weinhard, being first duly sworn, depose and say that I am the plaintiff in the above entitled action; and that the foregoing complaint is true as I verily believe.

HENRY WEINHARD.

Subscribed and sworn to before me this 21st day of February, 1899.

HENRY WAGNER,
[SEAL.] *Notary Public for the State of Oregon.*

5 And afterwards, on the 14th day of March, 1899, there was filed in the office of said clerk, a

Motion to Strike Out Parts of Complaint

in words and figures as follows, to-wit:—

(Title.)

Comes now the defendant above named, appearing by Platt & Platt, its attorneys, and moves the court

First. To strike out all that portion of the complaint contained within lines twenty-four (24) and thirty-two (32) both inclusive of page one (1) thereof; on the ground and for the reason that the same is incompetent, irrelevant immaterial, sham, and frivolous;

Second. To strike out the following paragraph in line thirty-four (34) page one (1) and line one (1) page two (2) to-wit: "in compliance with said request of said board of directors," on the ground and for the reason that the same is incompetent, immaterial, irrelevant, sham and frivolous;

Third. To strike out all that portion of the complaint contained between the words "and this" line four (4) of page three (3) and the word "void" in line eleven (11) page three (3) thereof, on the ground and for the reason that the same is incompetent, redundant and a conclusion of law.

PLATT & PLATT,
Attorneys for Defendant.

6 STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 4th day of March, 1899, by receiving a copy thereof, duly certified to as such, by Robert Treat Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

And afterwards, on Tuesday the 14th day of March, A. D. 1899, the same being the 8th judicial day of the March term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time, this cause coming on for hearing, on motion of defendant to strike out certain parts of plaintiff's complaint, plaintiff appearing by Thomas O'Day and George H. Williams, Esq., of his attorneys, and defendant appearing by Robert T. Platt, Esq., of Platt & Platt, its attorneys, and argument having been heard, and the court being fully advised, said motion is granted as to the
7 first and second parts thereof, and denied as to the third part; and in pursuance thereof all that portion of the complaint is hereby stricken out, contained between the lines twenty-four (24) and thirty-two (32), both inclusive, of page one (1) thereof; and the following paragraph in line thirty-four (34) of page one (1) and line one (1), page two (2), to-wit:—"in compliance with said request of said board of directors." And plaintiff is hereby given five days from and after the entry of this order within which to file an amended complaint herein.

(Signed) ARTHUR L. FRAZER, *Judge.*

Dated March 15th, 1899.

And afterwards, on the 13th day of April, 1899, there was filed in the office of said clerk, a

Demurrer

in words and figures as follows, to-wit:—

(Title.)

Comes now the defendant above named, appearing by Platt & Platt, its attorneys, and demurs to plaintiff's complaint on file herein, on the ground and for the reason that the same does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

PLATT & PLATT,
Attorneys for Defendant.

8 STATE OF OREGON, }
County of Multnomah, } ss:

Due service of the within demurrer is hereby accepted in Multnomah county, Oregon, this 13th day of April, 1899 by receiving a copy thereof, duly certified to as such, by Robert Treat Platt one of the attorneys for defendant.

O'DAY AND TARPLEY,
Attorneys for Plaintiff.

And afterwards, on Monday, the 8th day of May, A. D. 1899, the same being the 7th judicial day of the May term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time this cause coming on for hearing upon defendant's demurrer to plaintiff's complaint, the same having been
9 heretofore argued and taken under advisement by the court, plaintiff appearing by Thomas O'Day, Esq., of his attorneys, and defendant appearing by Platt & Platt, its attorneys, and the court being at this time fully advised,

It is considered and ordered that said demurrer be and the same hereby is overruled and the defendant given five days from and after this date within which to file its answer to plaintiff's complaint.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 27th day of June, 1899, there was filed in the office of said clerk, an

Answer

in words and figures as follows to-wit:—

(Title.)

The defendant for answer to the complaint in the above entitled cause, admits, denies and alleges as follows:—

I. Denies that the board of directors of the defendant corporation ever at any time without any lawful authority therefor passed the resolution set forth in the said complaint or any resolution. And in this behalf the defendant alleges that on or about the 11th
10 day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in words and figures following,

"TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial National Bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency

Now, therefore, notice is hereby given to said association under

the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department in the city of Washington and District of Columbia, this 5th day of December, A. D. 1896.

11 JAMES H. ECKELS,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

And the said defendant further alleges that under and by virtue of section 5205 of the Revised Statutes of the United States, it thereupon became and was the duty of the said board of directors within three months after receiving from the Comptroller of the Currency the said notice that the capital stock of the defendant had become impaired to an extent which made necessary an assessment thereon of $250,000., either to collect the said sum of $250,000. by assessment upon the stockholders of the defendant *pro rata* for the amount of capital stock held by each, or to cause the defendant to go into liquidation under penalty of having a receiver appointed by the Comptroller of the Currency to close up the business of the defendant; and that under and by virtue of the said section 5205 of the Revised Statutes of the United States, the said board of directors was vested with the authority and power to determine whether the defendant should pay up the said sum of $250,000 by assessment upon the shareholders of the defendant as aforesaid, or to go into liquidation; and that pursuant to and in the exercise of the said authority and power, and not otherwise, the board of said directors, on or about the 14th day of December, 1896, passed the resolution which is set forth in the said complaint, and levied upon all the shareholders of the defendant an assessment of fifty per cent. of the par value of their stock or fifty dollars per share.

12 II. Admits that no shareholders' or stockholders' meeting was held prior to the time when the said resolution was passed for the purpose of authorizing the said assessment, or of determining what action, if any, should be taken with reference to the said notice of assessment given by the Comptroller of the Currency as aforesaid but denies that the said resolution was passed or that any act of the said board of directors was done without the authorization of the stockholders of the defendant corporation. And in this behalf, the defendant alleges that the directors constituting the said board were elected as such directors by the shareholders and stockholders of the defendant within one year prior to the said 14th day of December,

1896, and that the term of office for which said directors were elected had not expired on the said 14th day of December, 1896, and that by virtue of the said election, and under and by virtue of section 5145 of the Revised Statutes of the United States, the said board of directors was authorized and empowered by the stockholders of the defendant to pass the said resolution, and to levy the said assessment.

III. Admits that the plaintiff refused to pay the said assessment and that on or about the 5th day of May, 1897, the defendant undertook to and did sell and dispose of the plaintiff's one hundred shares of the capital stock of the defendant for the purpose of paying
13 the said assessment but denies that the defendant association without any lawful authority therefor undertook to or did sell or dispose of any share or shares of the capital stock of the defendant which belonged to the plaintiff, for the purpose of paying any pretended or illegal assessment or any assessment, or for any purpose or at all, and denies that the said assessment was pretended or illegal or that under section 5205 of the Revised Statutes of the United States the board of directors of said defendant had no authority or right to make the said or any assessment on the stock or shares of the plaintiff, and denies that under section 5205 or any section of the Revised Statutes of the United States, or under any law of the United States, said assessment could only be made by order of thd shareholders of the defendant at a shareholders' meeting and not otherwise, and denies that under section 5205 or any section, of the Revised Statutes of the United States, or under any law of the United States the said assessment or any part or portion thereof, was ever or now is void, or that under section 5205 or any section of the Revised Statutes of the United States or under any law of the United States, there ever was any want of authority on the part of the said board of directors to make said assessment and sale, or to make the said assessment, or to make the said sale.

IV. Denies that the defendant ever at any time proceeded to or did advertise or sell the said one hundred shares of stock of plaintiff or any shares of stock belonging to the plaintiff, except as stated
14 in this answer, and denies that the defendant ever at any time or at all unlawfully and without the consent of the plaintiff, or unlawfully, or without the consent of the plaintiff, deprived the plaintiff of the use and possession, or of the use or of the possession of the said stock, or of the proceeds thereof, or of any stock, or of any of the proceeds of any stock, or unlawfully and without the consent of the plaintiff, or unlawfully or without the consent of the plaintiff ousted the said plaintiff as a shareholder or stockholder of said defendant association, to his damage in the sum of ten thousand dollars, or ousted the said plaintiff as a shareholder or stockholder of said defendant association or caused the plaintiff damage in the sum of $10,000 or in any sum or at all.

V. Alleges that thereafter, to-wit: on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution

passed by the said board of directors on the 14th day of December, 1896, and of the said assessment thereby levied upon the shareholders of the defendant, to be served upon the plaintiff and also upon each and every shareholder of the defendant; that prior to the 12th day of January, 1897, the said plaintiff and each and every stockholder of the defendant received, and had actual notice of the said resolution and of the said assessment; that the plaintiff failed and neglected to pay the said assessment or any part or portion
15 thereof, or to pay to defendant any sum of money whatever on account of the said or any assessment in pursuance of the said notice received by the defendant as aforesaid from the Comptroller of the Currency; that thereafter, to-wit, on the 18th day of March, 1897, at a meeting of the board of directors of the defendant which had been duly and regularly called and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board of directors was present and voted, the said board of directors passed a resolution wherein and whereby the said board of directors voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the said one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of said assessment upon the said one hundred shares of stock, to-wit: the sum of $5,000; that the said board of directors before the said sale gave due and legal notice thereof as required by the laws of the United States; that in pursuance of the said resolution the plaintiff's one hundred shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 p. m., at the banking house of the defendant in the city of Portland, State of Oregon, that at the said sale the defendant received for the said one hundred shares of stock the sum of $5,000.00 and no more; and that the whole number of the said one
16 hundred shares of stock was the least amount of the said one hundred shares of stock which would make the amount of the said assessment thereon.

VI. Alleges that under and by virtue of the laws of the United States, in such cases made and provided and particularly under and by virtue of section 5205 of the Revised Statutes of the United States the said board of directors was authorized and empowered to pass the said resolution which was passed on the 18th day of March, 1897, as aforesaid; and to make and cause to be made the said sale which was made on the 5th day of May, 1897, as aforesaid.

VII. Denies that the sum of ten thousand dollars was the reasonable value of the said one hundred shares of stock on the 14th day of December, 1896, or at any time thereafter, and denies that on the 14th day of December, 1896, or at any time thereafter, prior to the said sale, or at the time of said sale the said one hundred shares of stock were of any value whatever, and denies that the reasonable value of the said one hundred shares of stock at any time after the

said sale was greater than $5000.00. Denies that the plaintiff has been damaged by any act or acts of the defendant in the sum of $10,000 or in any sum or at all.

VIII. Denies that the said sale, or that the said conversion or that any sale, or any conversion, of the said one hundred shares of stock by the defendant was wrongful or that by virtue of any wrong-
17 ful act of the defendant association the plaintiff ceased to be a shareholder in said bank, or a shareholder of the defendant, or ceased thereafter or at any time to participate in the profits and emoluments or in the profits or in the emoluments of the defendant, and denies that any profits or emoluments have ever at any time since the 14th day of December, 1896, accrued to or been received by the defendant.

And for a first, further and separate answer and defence to plaintiff's complaint, the defendant alleges:

I. That on the said fifth day of December, 1896, the Comptroller of the Currency of the United States served a notice upon the defendant association which was and is in the words and figures following:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency:

Now therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assess-
18 ment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver shall be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

II. That said notice was received by the defendant association on the 11th day of December, 1896.

III. And that the said defendant further alleges that under and by

virtue of section 5205 of the Revised Statutes of the United States it thereupon became and was the duty of the said board of directors within three months after receiving from the Comptroller of the Currency the said notice that the capital stock of the defendant had become impaired to an extent which made necessary an assess-
19 ment of $250,000 thereon either to collect the said sum of $250,000 by assessment upon the stockholders of the defendant *pro rata* for the amount of the capital stock held by each, or to cause the defendant to go into liquidation, under penalty of having a receiver appointed the Comptroller of the Currency to close up the business of the defendant; and that under and by virtue of said section 5205 of the Revised Statutes of the United States the said board of directors was vested with the authority and power to determine whether the defendant should pay up the said sum of $250,000 by assessment upon the shareholders of the defendant as aforesaid, or should go into liquidation; and that pursuant to and in exercise of the said authority and power and not otherwise, the said board of directors on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant association duly and regularly called and held, a quorum being present unanimously passed the resolution which is set forth in the complaint, levying an assessment upon the shareholders of the association of fifty per cent. of the par value thereof or fifty dollars per share, payable at the banking house of the defendant association, on or before March 11th, 1897, and directing that the cashier of defendant association be authorized to serve upon each shareholder of defendant association a legal notice of the above assessment, by sending such notice to each shareholder's address by registered mail;

IV. Admits that no shareholders' or stockholders' meeting was held prior to the time when the said resolution was passed for
20 the purpose of authorizing the said assessment or of determining what action, if any, should be taken with reference to the said notice for assessment given by the Comptroller of the Currency as aforesaid, but alleges that the said resolution was passed and that every act of the said board of directors was done with and by the authorization of the stockholders of the defendant corporation. And in this behalf the defendant alleges that the directors constituting the said board were elected as such directors by the shareholders and stockholders of the defendant within one year prior to the said 14th day of December, 1896, and that the term of office for which the said directors were elected had not expired on the 14th day of December, 1896, and that by virtue of the said election, and under and by virtue of section 5145 of the Revised Statutes of the United States, the said board of directors was authorized and empowered by the stockholders of the defendant to pass said resolution, and to levy said assessment.

V. That thereafter, and on the 17th day of December, 1896, the defendant association acting by and through its cashier served notice on the plaintiff and each shareholder of the defendant association of said assessment by sending a certified copy of said resolution of said

board of directors through the United States mail, addressed to the plaintiff and each shareholder, at their regular addresses by registered mail, postage fully prepaid:

VI. That in and by the terms of said notice of the Comptroller of the Currency and the said resolution of said board of directors plaintiff was required to pay to defendant association fifty per cent. upon his said stock amounting to five thousand dollars, on or before the 11th day of March, 1897;

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VII. That prior to the 12th day of January, 1897, the said plaintiff and each and every shareholder of the defendant received and had actual notice of the said resolution of the said assessment;

VIII. That plaintiff did not pay to defendant association the said assessment or any part or portion thereof or the said sum of five thousand dollars or any sum or sums whatsoever on or before the 11th day of March, 1897, and has never paid said sum or any part thereof; or paid to the defendant any sum of money whatever on account of the said or any assessment in pursuance of the said notice received by the defendant as aforesaid from the Comptroller of the Currency.

IX. That thereafter, to-wit, on the 18th day of March, 1897, at a meeting of the board of directors of the defendant which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board of directors was present and voted, the said board of directors passed a resolution wherein and whereby the said board of directors voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the said one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the said assessment upon the said one hundred shares of stock, to-wit: the sum of $5000.00; that the said board of directors before the said sale gave due and legal notice thereof as required by the laws of the United States; that in pursuance of the said resolution the plaintiff's said one hundred shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 p. m. at the banking house of the defendant in the city of Portland, State of Oregon, that at said sale the defendant received for the said one hundred shares of stock the sum of $5000, and no more, and that the whole number of said one hundred shares of stock was the least amount of the said one hundred shares of stock which would make the amount of the assessment thereon.

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X. Alleges that under and by virtue of the laws of the United States in such cases made and provided and particularly under and by virtue of section 5205 of the Revised Statutes of the United States, the said board of directors was authorized and empowered to pass the said resolution which was passed on the 18th day of March, 1897, as aforesaid, and to make and cause to be made

the said sale which was made on the 5th day of May, 1897, as aforesaid.

23 And for a second, further and separate answer to the said complaint and by way of a separate and distinct defense to the cause of action therein set forth, the defendant alleges as follows:

I. On or about the 11th day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in the words and figures following:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank, Portland, Oregon, has become impaired to an extend which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency.

Now therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been re-

24 ceived by it, a receiver will be appointed to close up the business of the association, according to provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

II. Thereafter, to-wit, on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant, which has been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board was present and voted, the said board of directors passed a resolution which was and is in words and figures following:

Whereas, the board of directors of this bank did, on October 5th 1896, adopt a series of resolutions recommending to the Comptroller of the Currency that he levy an assessment of fifty per cent. upon the capital stock of this bank, in accordance with authority conferred upon him by section 5205 of the Revised Statutes of the United States:

And whereas, in accordance with such recommendation the Comptroller of the Currency has under date of December 5th, 1896, given notice to this association that its capital stock has become impaired to an extent which makes necessary an assessment of $250,000
25 upon the shareholders of the association in order to make good such deficiency.

Therefore be it resolved That in accordance with the notice served upon this association by the Comptroller of the Currency under date of December 5th, 1896, and received by this *ab*nk on the 11th day of December, 1896, an assessment is hereby levied upon the stockholders of this bank on or before March 11th, 1897;

And resolved, That the cashier of this bank be and he hereby is authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail.

III. Thereafter, to-wit on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution to be served upon the plaintiff and upon each and every shareholder of the defendant, and each and every shareholder of the defendant, including the plaintiff, received and had actual notice of the said resolution prior to the 12th day of January, 1897.

IV. That thereafter, to wit, on the 12th day of January, 1897, at a regular meeting of the stockholders of the defendant at which the plaintiff was present and voted, one, R. L. Durham, who was then the vice president and managing officer of the defendant, submitted to the shareholders of the defendant for action by them thereon
26 a report containing a full and complete statement of the facts hereinbefore alleged, to-wit:—the receipt by the defendant of the said notice from the Comptroller of the Currency and the passage by the said board of directors of the said resolution.

V. At the said meeting no protest against the said action of the said board of directors of the defendant in passing the said resolution or in levying the said assessment was made; but on the contrary, the shareholders present at the said meeting, including the plaintiff, unanimously voted that the said report of the said R. L. Durham should be received and placed on file among the official reports of the officers of the defendant and should be spread at length upon the minutes of the said stockholders' meeting.

VI. The plaintiff did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying the said assessment and did not in any was object to or question the legality, regularity or necessity of the said resolution or of the said assessment, but on the contrary fully and completely acquiesced therein.

VII. The plaintiff failed and neglected to pay the said assessment or any part or portion thereof.

VIII. Thereafter, to-wit:—on the 18th day of March, 1897,
27 at a meeting of the board of directors of the defendant, which had been duly and regularly called, and which was duly and

regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which meeting a quorum of the said board of directors was present and voted, the said board of directors passed a resolution, wherein and whereby the said board voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the assessment upon the one hundred shares of stock, to-wit:—the sum of $5,000. The said board of directors before the said sale caused due and legal notice thereof to be given and published as required by the laws of the United States, in such cases made and provided; and at the time and place specified in the said last mentioned resolution caused to be sold at public auction plaintiff's said one hundred shares of the capital stock of the defendant.

IX. The said board of directors in passing the said resolution which was passed on the 18th day of March, 1897, and in causing the said one hundred shares of stock to be sold, as aforesaid, relied upon the said silence of the plaintiff, at the said meeting of the shareholders of the defendant which was held on the 12th day of January, 1897, and relied upon his acquiescence in, and ratification of, the said resolution passed by the said board of directors on the
28 14th day of December, 1896, and in the assessment therein and thereby levied. The said board of directors would not have passed the said resolution which was passed on the 18th day of March, 1897, as aforesaid, and the said one hundred shares of stock would not have been sold by the said board of directors or by the defendant, to satisfy the said assessment, but for the said silence of the plaintiff and his said acqu-escence in and ratification of the said action of the said board of directors in passing the said resolution on the 14th day of December, 1896, and in levying the said assessment.

After the 14th day of December, 1896, and prior to the 18th day of March, 1897, the plaintiff well knew that the said board of directors of the defendant were relying and would rely upon the said silence of the plaintiff and the other shareholders of the defendant in regard to the said assessment, and upon the said acquiescence therein of the plaintiff and of the shareholders of the defendant, and upon the said ratification by the plaintiff and by the other shareholders of the defendant of the said action of the said board of directors in passing the said resolution which was passed on the 14th day of December, 1896, and in levying the said assessment and well knew that the said board of directors was about to and would, in reliance upon the said silence acquiescence and ratification of the plaintiff and of the other shareholders of
29 the defendant, cause the said one hundred shares of the capital stock of the defendant belonging to the plaintiff to be sold, as aforesaid, to satisfy the said assessment thereon. That plaintiff ought not to be admitted to allege that each

and every act of the defendant herein set forth, was not lawful and proper, and — each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set forth in order to lead defendant to rely thereon and to act as herein set forth. By reason of the premises and of the failure of the plaintiff to protest against or object to the said assessment or of the said sale of his said one hundred shares of the capital stock of the defendant.

And for a third, further and separate answer to the said complaint, and by way of a separate answer and distinct defense to the cause of action therein set forth, the defendant alleges as follows:

I. On or about the 11th day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in the words and figures following

TREASURY DEPARTMENT,

30 OFFICE OF THE COMPTROLLER OF THE CURRENCY,

WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollard ($250,000) upon the shareholders of said association to make good such deficiency.

Now therefore, notice is hereby given to said association under the provision of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,
Comptroller of the Currency

To the Commercial national bank, Portland, Oregon.

31 II. Thereafter, to-wit, on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board was present and voted, the said board of

directors passed a resolution which was and is in the words and figures following:—

Whereas, the board of directors of this bank did, on October 5th, 1896, adopt a series of resolutions recommending to the Comptroller of the Currency that he levy an assessment of fifty per cent. upon the capital stock of this bank, in accordance with authority conferred upon him by section 5205 of the Revised Statutes of the United States;

And whereas, in accordance with such recommendation the Comptroller of the Currency has under date of December 5th, 1896, given notice to this association that its capital stock has become impaired to an extent which makes necessary an assessment of $250,000 upon the shareholders of this association in order to make good such deficiency;

Therefore be it resolved That in accordance with the notice served upon this association by the Comptroller of the Currency under date of December 5th 1896, and received by this bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this bank of fifty per cent. or $50 per share, pay-
32 able at this bank on or before March 11th, 1897.

And resolved, That the cashier of this bank be and he hereby is authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail.

III. Thereafter, to-wit, on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution to be served upon the plaintiff and upon each and every shareholder of the defendant, and each and every shareholder of the defendant, including the plaintiff, received and had actual notice of the said resolution prior to the 12th day of January, 1897.

IV. That thereafter, to-wit, on the 12th day of January, 1897, at a regular annual meeting of the stockholders of the defendant, at which the plaintiff was present, and voted, one R. L. Durham, who was then the vice president and managing officer of the defendant, submitted to the shareholders of defendant for action by them thereon a report containing a full and complete statement of the facts hereinbefore alleged, to-wit:—the receipt by the defendant of the said notice from the Comptroller of the Currency and the passage by the said board of directors of the said resolution.

33 V. At the said meeting no protest against the said action of the said board of directors of the defendant in passing the said resolution or in levying the said assessment was made; but on the contrary, the shareholders present at the said meeting, including the plaintiff, unanimously voted that the said report of the said R. L. Durham should be received and placed on file among the official reports of the officers of the defendant, and should be spread at length upon the minutes of the said shareholders' meeting.

VI. The plaintiff did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying

the said assessment and did not in any way object to or question the legality, regularity or necessity of the said resolution, or of the said assessment, but on the contrary fully and completely acquiesced therein.

VII. That plaintiff failed and neglected to pay the said assessment or any part or portion thereof.

VIII. Thereafter, to-wit:—on the 18th day of March, 1897, at a meeting of the board of directors of the defendant, which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant, in the city of Portland, State of Oregon, and at which meeting a quorum of the said board of directors was present and voted, the said board of directors passed a resolution, wherein and whereby the said
34 board voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the said assessment upon the said one hundred shares of stock, to-wit: the sum of $5,000. The said board of directors before the said sale caused due and legal notice thereof to be given and published as required by the laws of the United States, in such cases made and provided; and at the time and place specified in the said last mentioned resolution caused to be sold at public auction the plaintiff's said one hundred shares of the capital stock of the defendant.

IX. Thereafter, to-wit: on the 2nd day of October, 1897, at a special meeting of the shareholders of the defendant, which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which shareholders holding more than two-thirds of the capital stock of the defendant were present and voted, there was adopted by the shareholders present at the said meeting a resolution that the defendant should be placed in voluntary liquidation under the provisions of section- 5220 and 5221 of the Revised Statutes of the United States. The said
35 resolution was adopted by the votes of shareholders holding more than two-thirds of the capital stock of the defendant. Thereafter the said board of directors caused notice of the said resolution to be certified under the seal of the defendant to the Comptroller of the Currency and to be published for a period of two months, and also caused notice to be published in the manner provided by law to the effect that the defendant was closing up its affairs, and that its creditors were invited to present their claims against the defendant for payment. Thereafter sundry claims against the defendant were presented for payment pursuant to said notice and all the claims which were so presented for payment were paid. The plaintiff did not at any time prior to the commencement of this action present any claim to or make any demand upon the defendant or notify or inform the defendant that he had or claimed to have any claim

or demand against it. That thereafter, to-wit, on the 13th day of July, 1898, all the assets of the defendant were sold by the defendant to Wells Fargo & Company, a corporation, for the sum of two hundred and fifty thousand dollars ($250,000). At the time of the said sale no claims against the defendant were known to the board of directors of defendant to be outstanding or unpaid, but on the contrary the said board of directors believed and had reason to believe that all claims against the defendant had been paid in full.

Thereafter the said board of directors distributed among the
36 shareholders of the defendant all the proceeds of the said sale of the assets of the defendant.

X. The said board of directors, in distributing among the shareholders of the defendant the said proceeds of the said sale of the assets of the defendant as aforesaid, relied upon the facts that no claims or demands had been presented against the defendant which had not been settled or paid. The said board of directors would not have distributed the said proceeds of the said sale, as aforesaid if it had not been that no claim or demand against the defendant had been presented which had not been paid. The plaintiff had full notice of the said sale of the assets of the defendant and before the said board of directors distributed among the shareholders of the defendant the said proceeds, *the said proceeds* of the said sale as aforesaid, the plaintiff well knew that the said board of directors were about to and would so distribute the said proceeds of the said sale, if no claim or demand against the defendant should be presented before such distribution should take place.

That plaintiff ought not to be admitted to allege that each and every act of the defendant herein set forth was not lawful and proper, and in each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set

forth in order to lead defendant to rely thereon and *and* to act
37 as herein set forth. By reason of the premises the plaintiff is estopped from now presenting any claim or demand against the defendant.

Wherefore, having fully answered the plaintiff's complaint, the defendant prays to be hence dismissed with its costs and disbursements taxed against the plaintiff.

PLATT & PLATT,
Attorneys for Defendant.

E. S. PILLSBERRY, *Of Counsel.*

STATE OF OREGON, }
County of Multnomah, } ss:

I, H. G. Hanley, being first duly sworn, depose and say that I am the cashier of the defendant Commercial National Bank of Portland in the above entitled action and that the foregoing answer is true as I verily believe.

H. G. HANLEY.

Subscribed and sworn to before me this 26th day of July, 1899.
[SEAL.] J. D. LEONARD,
Notary for Oregon.

STATE OF OREGON,
County of Multnomah, } ss:

38 I, H. G. Hanley, being first duly sworn depose and say that I am the cashier of defendant bank in the above entitled action, and that the foregoing answer is true, as I verily believe.
[SEAL.] H. G. HANLEY.

Subscribed and sworn to before me this 27 day of June, 1899.
ROBERT PLATT,
Notary Public for the State of Oregon.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within answer is hereby accepted, in Multnomah county, Oregon, this 27 day of June 1899 by receiving a copy thereof duly certified to as such, by Robert Treat Platt one if the attorneys for defendant.
THOMAS O'DAY,
Attorney for Plaintiff.

And afterwards, on the 29th day of June, 1899, there was filed in the office of said clerk, a

Demurrer

in words and figures as follows, to-wit:

(Title.)

1st. Comes now the above named plaintiff and demurs to
39 the first further and separate answer of the defendant and to the whole thereof, for the reason that same does not state facts sufficient to constitute a defense to plaintiff's complaint herein.
2d. Plaintiff demurs to the second further and separate answer of the defendant and the whole thereof, for the reason that same does not state facts sufficient to constitute a defense to plaintiff's complaint.
3d. Plaintiff demurs to the third further and separate answer of the defendant and the whole thereof, for the reason that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.
O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within demurrer is hereby accepted in Multnomah county, Oregon this 28 day of June 1899, by receiving a copy thereof, duly certified to as such by Thos. O'Day, attorney for plaintiff.

ROBERT T. PLATT,
Of Attorneys for Defendant.

40 And afterwards, on the 29th day of June, 1899, there was filed in the office of said clerk, a

Motion

in words and figures as follows to-wit:—

(Title.)

Comes now the above named plaintiff and moves the court to strike out all the following portions of defendant's answer herein, that is to say:—

1st. Commencing with the word "denies" line 17, page 1, to and inclusive of the word "share" line 11, page 3, for the reason that the same is sham, frivolous, redundant, immaterial and for the further reason that same alleges a conclusion and not a fact.

2d. Commencing with the word "but" line 18, page 3, to and inclusive of the word "assessment" line 32, same page, for like reason as above.

3d. Commencing with the word "but" line 8, page 4, to and inclusive of the word "sale" line 31, same page, for like reason as above.

4th. Commencing with the word "denies" line 32, page 4, to and inclusive of the word "all" line 15, page 5, for like reason as above.

5th. Commencing with the word "alleges" line 17, page 5, to and inclusive of the word "thereon" at or about line 25, page 6,
41 and immediately above VI, page 6, for like reasons as above.

6th. Commencing with the word "alleges" at or about line 27, page 6, to and inclusive of the word "aforesaid" line 1, page 7, for like reason as above.

7th. Commencing with the word "denies" line 15, page 7, to and inclusive of the word "defendant" line 25 page 7, for like reason as above.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 28 day of June, 1899, by receiving a

copy thereof, duly certified to as such by Thos. O'Day attorney for plaintiff.

ROBERT T. PLATT,
Of Attorneys for Defendant.

And afterwards, on Monday the 24th day of July, 1899, the same being the 48th judicial day of the May term of said court, there was rendered and entered the following

42 *Order*

in words and figures as follows, to-wit,

(Title.)

This cause having heretofore come on for hearing on plaintiff's motion to strike out certain parts of defendant's answer, and also upon plaintiff's demurrers to the first, second and third further and separate answers, contained within said answer of defendant, plaintiff appearing by Thomas O'Day, Esq., of his attorneys and defendant appearing by Platt & Platt, its attorneys, and argument having been had, and the court being at this time fully advised, the said motion and each and every part thereof is denied but the said demurrers and each of them are hereby sustained, and the defendant having moved the court for permission to amend the second and third separate answers and defenses by interlining after the period in line 18 of page 18 and after the period in line 29, page 24 thereof, the following paragraph:

"That plaintiff ought not to be admitted to allege that each and every act of defendant herein set forth was not lawful and proper, and in each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set forth in order to lead the defendant to rely thereon and to act as herein set forth."

43 It is considered and ordered that the defendant have leave to amend in said two particulars by interlineations of the said paragraph upon attaching to the said answer a verification of said answer as amended, and the said demurrer as filed to said second and third separate answers and defenses shall stand as against said answers and defenses thus amended. And it is further considered and ordered that the demurrers to the said second and third separate answers and defenses as amended shall be and they are hereby sustained.

ARTHUR L. FRAZER, *Judge.*

44 And afterwards, on the 5th day of February, 1900, there was filed in the office of said clerk, a

Stipulation

in words and figures as follows, to-wit:—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

GEORGE H. DURHAM, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

CLEVELAND ROCKWELL, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

45 In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

H. C. LEONARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

ELLA C. DURHAM, Administratrix of the Estate of S. A. Durham, Deceased, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

PERRY HINKLE, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiffs above named, all acting by their attorneys of record, O'Day & Tarpley, except plaintiff H. C. Leonard who acts by Nixon & Dolph, his attorneys of record, and the defendant in all said actions appearing by E. S. Pillsbury and Platt & Platt, its attorneys of
46 record; that the case of George H. Williams *versus* Commercial National Bank of Portland, now pending and at issue in department two of said court, and the cause of Henry Weinhard *versus* Commercial National Bank of Portland, now pending and at issue in department one of said court shall be set for trial in their respective departments upon the same day and when so set they shall be tried at the same time by and before the presiding judges in the said departments sitting for said purpose in either of the court rooms of said departments as may suit the convenience of said judges with the same force and effect as though the said trials were conducted separately by and before said judges in their respective departements and the said causes shall be tried without the intervention of a jury or juries and the same are hereby expressly waived by all the parties hereto. All of the evidence produced or received on the said trial shall be considered as offered in each of said causes and shall apply to and govern each of the said judges in arriving at their findings of fact and conclusions of law therein and judgment thereon and thereafter which said findings of fact and conclusions of law and judgment based thereon shall be made and rendered in the respective departments wherein said causes are pending except that such evidence as the defendant may offer in the said cause of George H. Williams *versus* Commercial National Bank of Portland to sustain the second and third separate answers and defenses contained within its answer and such evidence as said plaintiff may offer in relation thereto, shall not be considered by the presiding judge of said department one as no such issues as are raised by said

second and third separate answers of defendant are presented
47 in the case of Henry Weinhard *versus* Commercial National Bank of Portland;

It is further stipulated and agreed that in the remainder of said causes recited in the caption hereto, to-wit, George H. Durham *vs.* Commercial National Bank of Portland, Cleveland Rockwell *vs.* Commercial National Bank of Portland, H. C. Leonard *vs.* Commercial National Bank of Portland, all pending in department one of said court, and Ella C. Durham, as administratrix of the estate of S. A. Durham, deceased, *vs.* Commercial National Bank of Portland, and Perry Hinkle *vs.* Commercial National Bank of Portland, both pending in department two of said court, no further action shall be taken by any of the parties thereto until after final judgment in the court of last resort to which said case of Henry Weinhard *vs.* Commercial National Bank of Portland may be taken or judgment of above entitled court based on such decision by said court of last resort and in as much as a Federal question is involved in such cases, said court of last resort shall be interpreted to mean the Supreme Court of the United States, provided, however, that if either party shall fail to prosecute an appeal or writ of error in time from any decision that mey be rendered in said cause, such failure to so appeal or sue out writ of error shall for the purposes of permitting action in those causes covered by this branch of this stipulation be equivalent to a decision or judgment by the said United States Supreme Court in affirmance.

On such final decision by said Supreme Court of the United States or judgment herein in accordance therewith in said case of Henry Weinhard *versus* Commercial National Bank of Port-
48 land, judgment shall be rendered in each of the said causes covered by this branch of this stipulation in accordance with the legal import and effect of the decision in the said Weinhard case wherein the issues are identical with said cases except as to the number of shares of the capital stock of the defendant involved, but in the event that such decision or judgment in said Weinhard case shall be for said plaintiff, said judgments shall as to this particular follow the allegations of the respective complaints as to the number of shares.

Provided that if said Weinhard shall wilfully and contrary to the wishes of the other plaintiffs whose cases are stayed under the terms of this stipulation, refuse to appeal or sue out a writ of error from any decision adverse to him, then and in that case the decision in said Weinhard case shall not be conclusive on said plaintiffs but the decision of the court of last resort in the case of George H. Williams *versus* Commercial National Bank of Portland upon those issues in said Williams case are presented alike in all the cases recited in the caption hereof shall govern the cases stayed hereunder with like effect as though said Williams case had been originally named herein in the place and stead of said Weinhard case as the case of final decision in which in the court of last resort was to be followed by the respective

departments of the above entitled court, after such decision by said court of last resort has been made.

Provided, that if both said Weinhard and said Williams shall both wilfully and contrary to the wishes of plaintiff, H. C. Leonard, whose case is stayed under the terms of this stipulation, re-
49 fuse to appeal or sue out a writ of error from any decision adverse to them, then and in that case the decision in said Weinhard and Williams cases shall not be conclusive on said plaintiff H. C. Leonard, but any time within sixty days after the time to appeal or sue out a writ of error in said Weinhard and Williams cases shall have elapsed pursuant to said wilful abandonment by said Weinhard and Williams, plaintiff H. C. Leonard may cause a judgment to be entered in his case in department one of the above entitled court in accordance with the original decision and judg-*em*-t in the Weinhard case in said above entitled court and thereafter said case shall proceed in its regular course. Failure to so act within sixty days shall be construed as an adoption of the decision in the Weinhard case from which no appeal or writ of error has been taken and authorize defendant to enter judgment against plaintiff H. C. Leonard so failing to act in department one of the above entitled court in accordance with said Weinhard decisions adopted. The prosecution of either the Weinhard or Williams cases to the court of last resort shall, however, bind plaintiff Leonard as well as the other plaintiffs as hereinbefore provided.

In case of disagreement on the part of said judges as to the admissibility of any testimony offered, the record shall show in which of said causes said testimony is received and in which rejected and the grounds of objection.

This stipulation shall be filed in said case of George H. Williams *versus* Commercial National Bank of Portland and considered as filed in each of the other cases recited in the caption hereof.

50

O'DAY & TARPLEY,
Attorneys for all Plaintiffs Excepting H. C. Leonard.
NIXON & DOLPH,
Attorneys for Plaintiff H. C. Leonard.
E. S. PILLSBURY,
PLATT & PLATT,
Attorneys for Defendant.

And afterwards, on Tuesday the 20th day of February, 1900, the same being the 37th judicial day of the January term of said court, there was rendered and entered the following,

Order

in words and figures as follows, to-wit,

(Title.)

Now at this time, this cause comes on regularly for trial before the court, the parties hereto having stipulated that said cause be
51 tried without the intervention of a jury, plaintiff appearing in person and by O'Day and Tarpley, his attorneys and the defendant by Platt and Platt and E. S. Pillsbury its attorneys,

The court, after hearing the allegations of parties and part of the testimony of witnesses and the time for adjournment having arrived, the further hearing of this cause is continued until to-morrow morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on Wednesday, the 21 day of February, 1900, the same being the 38th judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

At this time come the same parties and counsel as of yesterday and the trial of this cause is again proceeded with.

After hearing further testimony of witnesses and the hour of adjournment having been reached, the court ordered and this
52 cause is hereby continued until Friday morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards on Friday the 23rd day February, 1900, the same being the 39 judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

At this time comes the same parties and counsel as of yesterday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

53 And afterwards, on Saturday the 24th day of February, 1900, the same being the 40th judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

At this time come the same parties and counsel — of yesterday, and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders, and this cause is continued until Monday morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 26th day of Feb'y 1900, the same being the — judicial day of the Jan'y term of said court, there was rendered and entered the following

Order

in words and figures as follows, to wit,

(Title.)

54 At this time come the same parties and counsel as of Saturday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on Tuesday the 27th day of February, 1900, the same being the 43rd judicial day of the January term, of said court, there was rendered and entered the following,

Order

in words and figures as follows to-wit,

(Title.)

At this time come the same parties and counsel as of yesterday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached the court orders, and this cause is hereby continued until to-morrow at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

55 And afterwards, on Wednesday the 28th day of Feb'y, 1900, the same being the — judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit

(Title.)

At this time come the parties and counsel as of yesterday and the trial of this cause is ag-in proceed- with. After hearing further testimony of witnesses, and part of argument of counsel and the hour of adjournment having been reached, the court orders, and this cause is hereby continued until to-morrow morning at 9,30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on Thursday the 1st day of March, 1900, the same being the — judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

56 Come now the same parties and counsel as of yesterday and the trial of this cause is again proceeded with. After hearing the arguments of counsel and the court not being fully advised in the premises takes same under advisement.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 24th day of October, 1900, there was filed in the office of said clerk, a

Motion

in words and figures as follows, to-wit,

(Title.)

Comes now the abo*ut* named defendant and moves the court for a rehearing in this cause on that part of the findings of the court, wherein the stock held by plaintiff in the defendant corporation was found to be of the value of twenty dollars per share on the fifth day of May, 1897, and the good will thereof was found to be of the value of ten dollars per share on the fifth day of May, 1897, on the ground and for the reason that the evidence submitted in this cause was insufficient to sustain such findings.

PLATT & PLATT,
Attorneys for Defendant.
E. S. PILLSBURY, *Of Counsel.*

57 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 23rd day of October, 1900, by receiving a copy thereof duly certified to as such by Robert T. Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

And afterwards, on the 2nd day of November, 1900, there was filed in the office of said clerk, a

Motion

in words and figures, as follows to-wit,

(Title.)

Comes now the defendant above named appearing by E. S. Pillsbury and Platt & Platt, its attorneys, and moves and requests the court that in making its findings of facts herein it find separately upon the value of the stock of the defendant on the fifth day of May, 1897, if any it had, and upon the value of the good will of the shares of stock of the defendant on said date if any they had.

E. S. PILLSBURY,
PLATT & PLATT,
Attorneys for Defendant, Commercial National Bank of Portland.

58

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 1st day of Nov. 1900, by receiving a copy thereof duly certified to as such, by Robe-t T. Platt, one of the attorneys for defendant Commercial National Bank of Portland.

O'DAY,
Attorneys for Plaintiff.

And afterwards on Monday the 12th day of November,1900, the same being the 6th judicial day of the November term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

Now at this time, by consent of the respective parties the motion of the defendants for a rehearing comes on for hearing.

The court after hearing the arguments of counsel and not being fully advised in the premises takes the same under advisement.

(Signed) ARTHUE L. FRAZER, *Judge.*

59 And afterwards, on Monday, the 12th day of November, 1900, the same being the 6th judicial day of the November term of said court, therr was rendered and entered the following

Order

in words and figures as follows, to-wit

(Title.)

Now at this time by consent of the respective parties the motion to separately state value of stock in the findings of facts comes on for hearing.

The court after hearing the arguments of counsel and not being fully advised in the premises takes the same under advisement.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 6th day of December, 1900, there was made and filed in the office of said clerk, an

Order

in words and figures ad follows, to-wit,

(Title.)

Be it remembered, that upon the trial of the above entitled cause before the court, the parties hereto having waived a jury, before any findings were signed by the court, the plaintiff filed his motion asking the court for an additional finding to the effect that
60 plaintiff was entitled to interest upon the value of his stock wrongfully converted by defendant from the date of such conversion, but the court refused to make such finding, and decided that the plaintiff was not entitled to any interest, to which refusal and decision the plaintiff at the time duly excepted and his exceptions were allowed and the same are her-by signed and made part of the record in this cause.

Dec. 7th. 1900.

ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 6th day of December, 1900, there *was* filed in the office of said clerk,

Findings of Fact and Conclusions of Law

in words and figures as fol-ows, to-wit,

(Title.)

Findings of fact and conclusions of law.

This cause having duly come on for hearing before the court without the intervention of a jury, the parties hereto by their stipulation in writing filed herein, having expressly waived a jury in this cause and the court having heard the testimony and argument of counsel herein, and being fully advised in the premises, hereby makes and files the following findings of fact and conclusions of law.

Findings of Fact.

61 I. That on the 5th day of May, 1897, the plaintiff herein was the owner and holder of 100 shares of the capital stock of the defendant bank, of the par value of $10,000.00 as alleged in the complaint herein.

II. That on said date the defendant bank wrongfully converted same to its own use and benefit, as alleged in the complaint, and thereby deprived said plaintiff of said stock and the whole thereof, and that said stock on said date was of the actual value of $30.00 per share, being of the total value of $3000.00.

Conclusions of Law.

That said plaintiff is entitled to judgment against said defendant Commercial National Bank of Portland for the sum of three thousand dollars and for his costs and disbursements, taxed at $— and that he have execution therefore.

Dec. 6th. 1900.

ARTHUR L. FRAZER, *Judge.*

And afterwards, on Friday, the 7th day of Dec., 1900, the same being the 27th judicial day of the Nov. term of said court, there was rendered and entered the following

62 *Order*

in words and figures as follows, to-wit:—

(Title.)

Now on this day this cause coming on to be heard and the court having heretofore made and filed findings of fact and conclusions of law in this action to which reference is hereby made,

It is therefore considered by the court that said plaintiff have and recover against said defendant The Commercial National Bank of

Portland the sum of three thousand dollars and his costs and disbursements herein taxed at $26.25, and that he have execution therefor.

It is further ordered that defendant have until Jan'y 15th, 1901, to prepare and file a bill of exceptions.

Dec. 7th. 1900.

ARTHUR L. FRAZER, *Judge.*

63 And afterwards, on the 30th day of April, 1901 there was filed in the office of said clerk, a

Bill of Exceptions

which is in words and figures as follows to-wit:—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

Be it remembered, that this cause came on regularly for trial before the court the — day of —— 1900, the parties hereto having waived a jury, and consented to the trial of the same without a jury, the plaintiff appearing by Thomas O'Day, Esq., his attorney, and the defendant appearing by E. S. Pillsbury and Platt & Platt, its attorneys, and thereupon the following legal proceedings were had, to-wit:

Counsel for plaintiff made a statement as follows:—

"We stand on the pleadings and offer no evidence."

Thereupon the defendant moved the court for a non-suit on the following ground-:—

"1st. That the plaintiffs have introduced no testimony to sustain the affirmative allegations of their complaint; that a distinct
64 issue is tendered as to the value of the property claimed to have been converted and that allegation of value is denied by the allegations of the answer, and thus an issue is tendered and the plaintiffs not having introduced any testimony in support of the affirmative of that issue, they have not made out such a case as would throw the burden of proof on the defendant.

2nd. That in the allegations of the answer the sale and all the proceedings in connection therewith are regular under the provisions of the national bank act, and the property was lawfully and properly sold by the defendant and no conversion took place. We refer to the section of the national bank act which relates to the sale, sec. 5203, Revised Statutes of the United States, and base our motion for non-suit as to that clause upon that section of the statute; and also upon the following sections of the Revised Statutes:

Sec. 5145, sec. 5136, also the following sections:—

5147	5137	5170	5142
5149	5162	5164	5166
5167	5171	5182	5183
5190	5191	5195	5196
5197	5201	5102	5103
5104	5206	5214	5222

also Revised Statutes 5142, as amended by section 1 of an act approved May 1, 1886. That will be found in the supplement of the Revised Statutes; also section 3 of an act approved June 30, 1876, and an act approved July 12th, 1882;

65 Also section 1 of an act approved May 1, 1886, giving the shareholders right to vote on increase of capital stock; also section 2 of the same act; and section 3 of an act approved June 30th, 1876, as amended by an act of August 3rd, 1892; all of these references being made to the statutes of the United States in reference to national banks. I will refer for general reference to the statute as a whole with the substituted amendments."

Counsel for plaintiff thereupon stated as follows:—

"We are willing to risk our position on the proposition that the plaintiff did own at the time of this sale sixty shares of the paid up capital stock."

The court denied the motion for a non-suit and to this ruling of the court, the defendant at the time excepted, which exception was by the court allowed.

Thereupon the cause was submitted to the court upon the testimony and the arguments of counsel, and the court subsequently and on the 2nd day of October, 1900, delivered its opinion in writing, signed by the judge, and the same was filed in said court with the papers in this cause and is as follows:

"GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK, Defendant.

Opinion of Court.

This action is brought by plaintiff, a stockholder of the defendant, a national bank, to recover for an alleged conversion of stock
66 in said bank. He claims that he was the owner of 60 shares of such stock of the par value of $6,000.00; that upon October 5th, 1896, the board of directors adopted resolutions requesting the Comptroller of the Currency to call for an assessment of 50% upon the capital stock of the bank in accordance with a provision of the U. S. statutes, under a claim that the capital stock had been impaired; that the comptroller on Dec. 5th gave notice of impairment to an extent which made necessary an assessment of $250,000.00 or 50% assessment on the face value of the said stock; that thereafter the board of directors passed a resolution levying the assessment contemplated.

It is furthermore averred that the action of said board and comptroller was without any authorization of the stockholders; and herein it is claimed was the illegality of the action of such board of directors and the defendant.

Thereafter it is claimed and conceded by defendant a sale *in invitum* was made of plaintiff's said stock for non-payment of the assessment;

The plaintiff asserting its value at such time to have been $6,000.00 asks for a judgment in such sum together with interest from May 5, 1897, the date of the sale.

It is obvious that the subject matter of inquiry arising upon this complaint is as to whether the board of directors may act as was done here without the approval of indeed any action upon the part of the stockholders sustaining such act.

This question was presented to the court by demurrer and decided adversely to defendant's contention.

Thereafter defendant answered and the cause was tried
67 before two judges of the court without the intervention of a jury.

After the determination of the legal questions referred to, the sole matter for the consideration of the court was the amount of value of the plaintiff's shares of stock at the time of the sale aforesaid, the plaintiff claiming that it was worth at least 50% of its face value at such time, aside from the good will, the worth of which should be added thereto; the defendant upon the other ha-d denying that it possessed any value whatever; and to the elucidation of this question much testimony was taken and voluminous briefs have been presented by the respective counsel.

The court has been but little hampered by questions of law, though incidentally to the main issue many cases have been cited, and while agreeing upon some of the main questions involved, the arguments of counsel have taken a wide range as to the method of arriving at this value of the stock.

The opinion of the court is that the value of the shares of stock at the time of a conversion presents the true rule in a case of this nature. How shall this value be reached? No method has been found satisfactory except by a careful examination of the testimony adduced upon each side, computing the worth of the holdings of the bank, etc. and while mathematical accuracy has proved unat-ainable, an endeavor has been made to approach a fair and just valuation by a proper estimate of the worth of such assets as the testimony has reached.

We have been unable to concur with the position of the plaintiff that under any view this stock is shown to have been worth
68 50% on its face value under the circumstances of the sale.

We find no elements of estoppel resulting therefrom, nor do the cases cited by counsel to our minds sustain their contention; at least the weight of authority is upon the other side.

Nor does it appear conclusive that $3,000.00 would be the plain-

tiff's share of the assets sold to Wells Fargo & Co., for $250,000.00 nor that this sale should furnish a final, if any, test of value.

A somewhat acrimonious discussion too, took place as to the *animus* of Wells Fargo & Co.'s conduct and a claim has been asserted that in some way damages should be enhanced through some application of the rules relating to punitive damages; but this view has not met with an hospitable reception at the hands of the court. Not being founded in the opinion of the court upon any correct legal principle its consideration has been rejected.

On the other hand we are unable to subscribe to the views of the defendant's counsel that this stock was valueless nor even that the good will was without value.

It would serve no good purpose to review the large amount of evidence submitted. We are clear from the weight of the evidence as to certain tangible assets that these shares of stock had a value. The witnesses for the defendant have wholly underrated these assets though a correspondingly false enhancement thereof has been made by the other side. Nothing is more difficult than for minds differently constituted to agree upon matters of this kind nor is it an essential impeachment of the honesty or good intentions of witnesses that these differences should exist; they largely result from inherent intellectual idiosyncracies. We are of the opinion that the good will of this bank, if properly nursed and protected, had a value.

69 To announce finally and in short our views without attempting to discuss more fully the evidence, we place the value of the shares of plaintiff's stock at the time of the sale thereof by defendant at the sum of twenty dollars per share without the good will.

If these shares had a value, it must, we think, be obvious that the good will of the bank was of some worth, even though at the moment the business was conducted without profit.

This bank had an established business; the patronage of valued customers, the result of years of work in this community.

This says Judge Story is the "benefit acquired by an establishment beyond the mere value of the capital, stocks, funds or property employed therein, in consequence of the general public patronage and encouragement which it rece-ves from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Story Part'p sec. 99 33 Cal. 624.

We have placed this value at ten dollars per share. These results are necessarily somewhat arbitrary. In the nature of the case such conclusion may not be avoided. But it is a careful and paidstaking consummation of a task which has taxed our energies to the fill, and is in our view, the nearest approach to accuracy attainable in the light in which the questions involved have been presented.

70 This action sounding in tort we find no basis in the claim for interest as this matter is treated under the Oregon statute,

and such claim will be disallowed, before at least the decision of the case.

Let findings be prepared in conformity with the views hereinbefore expressed.

SEARS, *J.*

The foregoing is concurred in by Judge Frazer.

Endorsed: Circuit court Multnomah county Oregon. Geo. H. Williams *v.* Commercial Nat. Bank. Opinion of court. Filed Oct. 2nd, 1900, J. P. Kennedy clerk, by Lansing Stout deputy.

Thereupon before any other or further findings of fact or conclusions of law were singed by the court the defendant filed its written motion asking the court that in making its formal findings of fact, it find separately upon the value of the stock of the defenéant on the 5th day of May, 1897, it any it had, and upon the value of the good will of the shares of stock on said date, if any they had; the court having by its said decision in writing herein found that the intrinsic and appraised value of the assets represented by said shar-s and therefore of said shares was twenty dollars per share, and the court having further found that it followed that as said shares were intrinsically of such value, the good will thereof also had a v-lue placed at the additional sum of ten dollars per share, which said motion to separately find was by the court denied, to which refusal and denial the defendant duly excepted and its exception was allowed;

71 Wherefore the defendant presents this, its bill of exceptions, which having been examined by the court and made to conform to the facts and allowed, is now signed and made a part of the record in this cause, this 30th day of April 1901, as and of *the* January 15th, 1901.

ALFRED F. SEARS, JR., *Judge.*

STATE OF OREGON,
County of Multnomah, } *ss:*

Due service of the within bill is hereby accepted in Multnomah county, Oregon, this 15th day of January, 1901, by receiving a copy thereof duly certified to as such by Harrison G. Platt one of the attorneys for defendant.

THOS. O'DAY,
Of Attorneys for Plaintiff.

72 And afterwards, on the 3rd day of June, 1901, there was filed in the office of the said clerk, a

Notice of Appeal

in words and figures, to-wit

In the Circuit Court of the State of Oregon for Multnomah County.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

To Henry Weinhard, plaintiff, and to O'Day & Tarpley, his attorneys:

You and each of you will please take notice that the defendant, Commercial National Bank of Portland, appeals to the supreme court of the State of Oregon from the judgment given and entered in the above entitled cause on the 7th day of December, 1900, by the circuit court of the State of Oregon for Multnomah county.

PLATT & PLATT,
Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, } *ss:*

Due service of the within notice is hereby accepted in Multnomah county, Oregon, this 3rd day of June, 1901, by receiving a
73 copy thereof duly certified to as such by Harrison G. Platt one of the attorneys for defendant.

THOS. O'DAY,
Attorney for Plaintiff.

And afterwards, on the 5th day of June, 1901, there was filed in the office of said clerk, an

Undertaking on Appeal

in words and figures, as follows, to-wit,

In the Circuit Court of the State of Oregon for Multnomah County.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, a Corporation, Defendant.

Whereas, the defendant in the above entitled cause appeals to the supreme court of the State of Oregon, from the judgment made and entered in the above entitled cause on the 7th day of December, 1900, by the above entitled court:

Now therefore, in consideration of the premises and of such appeal, we, the undersigned defendant as principal and R. Lea Barn-s, as surety, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages, costs and disbursements that may be awarded it on the appeal.

COMMERCIAL NATIONAL BANK
OF PORTLAND,
By PLATT & PLATT, *Its Attorneys.*
R. LEA BARNES.

74 STATE OF OREGON, } ss:
County of Multnomah, }

I, R. Lea Barnes, whose name is subscribed to the within undertaking as surety, being duly sworn, say that I am a resident and householder within the State of Oregon, and am not a counselor or attorney at law, sheriff or clerk or other officer of any court, am worth the sum of five hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

R. LEA BARNES.

Subscribed and sworn to before me this 4th day of June, 1901.
[SEAL.] HARRISON G. PLATT,
Notary Public for Oregon.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within undertaking on appeal is hereby accepted in Multnomah county, Oregon, this 4th day of June, 1901, by receiving a copy thereof certified to as such by Harrison G. Platt, one of attorneys for defendant.

THOS. O'DAY,
Attorneys for Plaintiff.

75 And afterwards, on the 3rd day of July, 1901, there was filed in the office of the said clerk, a

Stipulation

in words and figures as follows, to-wit:—

(Title.)

It is hereby stipulated and agreed by and between the parties to the above entitled cause, acting by their respective attorneys, that defendant and appellant may have to and including the first day of August, 1901, in which to file transcript on appeal in this cause in the supreme court of the State of Oregon, and it is further stipulated that an order pursuant hereto be entered upon motion of defendant.

THOS. O'DAY,
Attorneys for Plaintiff.
PLATT & PLATT,
Attorney- for Defendant.

And afterwards, on Wednesday the 3rd day of July, 1901, the same being the 48th judicial day of the May term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

76 (Title.)

Now at this time based on the stipulation of parties it is ordered that defendant and appellant do have to and including the first day of August, 1901, in which to file transcript on appeal in this cause in the supreme court of the State of Oregon.

(Signed) ARTHUR L. FRAZER, *Judge.*

77 In the Circuit Court of the State of Oregon for the County of Multnomah.

STATE OF OREGON, *County of Multnomah,* } ss:

I, J. P. Kennedy, clerk of the circuit court of the State of Oregon, for the county of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries and bill of exceptions constituting the judgment rool, together with the notice of and undertaking on appeal in the case of Herny Weinhard, plaintiff and respondent, *vs.* Commercial National Bank of Portland, a corporation, defendant and appellant have been by me compared with the originals thereof, and that they are true and correct transcripts of such originals pleadings, papers, orders, journal entries and bill of exceptions and notice of and undertaking on appeal as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court the 25th day of July, A. D. 1901.

J. P. KENNEDY, *Clerk,*

[SEAL.] By LANSING STOUT, *Deputy.*

78 In the Circuit Court of the State of Oregon for the County of Multnomah.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, a Corporation, Defendant and Appellant.

STATE OF OREGON, *County of Multnomah,* } ss:

I, J. P. Kennedy, clerk of the circuit court of the State of Oregon, for the county of Multnomah, do hereby certify that on the 5th day of June 1901, Commercial National Bank of Portland, a corporation

the defendant and appellant in the above entitled cause, filed its undertaking on appeal, with R. Lea Barnes as surety therein conditioned that the said appellant will pay all damages, costs and disbursements which may be awarded against it on the appeal.

And I further certify that said undertaking is given for an appeal only.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court this 25th day of July, A. D. 1901.

[SEAL.] J. P. KENNEDY, *Clerk*,
By LANSING STOUT, *Deputy*.

79 (Endorsed:) In the supreme court of the State of Oregon Appeal from Multnomah county. Henry Weinhard, plaintiff and respondent, *vs.* Commercial National Bank of Portland, defendant and appellant. Transcript. Filed August 1, 1901 J. J. Murphy, clerk. By J. W. Reeves, deputy.

80 HENRY WEINHARD, Respondent,
v.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Appellant.

GEORGE H. WILLIAMS, Respondent,
v.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Appellant.

Appeal from Multnomah county.

Hon. Alfred F. Sears, Jr., and Hon. Arthur Frazer, judges.

Thos. O'Day, Geo. H. Durham and Geo. H. Williams, for respondent.

H. G. Platt, for appellant.

Bean, C. J.

Affirmed.

81 Two separate actions were brought by Henry Weinhard and George H. Williams, respectively, to recover the value of certain shares of stock in the defendant corporation alleged to have been wrongfully converted by it. As the same questions are involved in each case, they are here considered together.

The defendant is a banking association, organized under the national bank act. On December 5, 1896, the Comptroller of Currency found that its capital stock had become impaired to an extent which made necessary an assessment of $250,000, and notified the association to pay the deficiency by assessments upon its shareholders *pro rata;* and, if not so paid and the bank should refuse to go into liquidation as provided by law for three months after the receipt of the notice, a receiver would be appointed to close up its business. Upon the receipt of the notice, the directors of the bank held a meeting and levied an assessment upon each shareholder of fifty per cent. or fifty dollars per share, payable on or before March 11, 1897. At the time of such assessment, Weinhard owned one hundred shares of the

capital stock, fully paid up, of the par value of $10,000, and Williams, sixty shares, of the par value of $6,000, likewise fully paid up. They both refused or neglected to pay the assessment levied by the directors, and, on May 5, 1897, their stock was sold at public auction, in pursuance of a resolution of the board, and the bank received on such sale the amount of the assessment. Thereafter these actions were brought to recover the value of the stock sold by the corporation, alleging it to be worth par, on the ground that the assessment was invalid and without authority of law. The plaintiffs recovered judgment in the court below, and the bank appeals.

BEAN, C. J.:

Two questions are presented for our determination on this appeal: First, it is insisted that the court erred in overruling the defendant's motion for a nonsuit, and, second, in holding that under the
82 national bank act the authority to levy assessments upon the shareholders of a bank for the purpose of repairing its capital stock is vested in the shareholders themselves, and not in the directors.

The plaintiffs offered no testimony, as part of their case in chief, tending to show the value of the stock alleged to have been converted by the defendant, and for this reason it is urged that the motion for a nonsuit was well taken. At the time of the sale the bank was a going concern, engaged in the transaction of the ordinary business of a banking association, and it may be presumed, we think, that its stock had some value, at least sufficient to entitle the plaintiff- to a nominal judgment, if their stock had been wrongfully converted. In addition to this it appears from the opinion of the trial court, which is set out in full and made a part of the bill of exceptions, that "much testimony was taken, and voluminous briefs have been presented by the respective counsel" upon the question as to the value of the stock, so it would seem that, if there was error in overruling the motion for a nonsuit, it was subsequently cured.

The other question involves a construction of the national bank act. It provides, in brief, that any number of natural persons, not less than five, may form an association for carrying on the business of banking by executing and filing with the Comptroller of the Currency articles of association and an organization certificate stating certain facts: U. S. Rev. St., §§ 5133, 5134, 5135. Such association thereupon becomes a body corporate, with power, among other things, to elect or appoint directors and, by such directors, to appoint a president, vice-president, cashier, and other officers, etc., to prescribe by-laws, regulating the manner in which its stock shall be transferred, its directors and officers elected or appointed, its general business conducted, and the privileges granted to it by law exercised and enjoyed, and to exercise all such incidental powers as shall be necessary to carry on the business of banking, etc.; *id.*, § 5136.

At least fifty per centum of the capital stock must be paid in
83 before the bank can be authorized by the Comptroller of the Currency to commence business, and the remainder in

monthly installments of at least ten per centum, which fact shall be certified to such officer under oath: *Id.*, §§ 5139, 5140. The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders: *Id.*, § 5145.

The shareholders are individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of the association to the extent of the amount of their stock therein, at its par value, in addition to the amount invested in such shares (*id.*, § 5151), and no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital: *Id.*, § 5204. Section 5205 reads as follows: "Every association which shall not have fully paid up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four."

The assessment and subsequent proceedings in this case were had under the provisions of the section quoted, and the question for our decision is whether, when the Comptroller of the Currency
84 finds that the capital stock of a national bank has been impaired by losses, or otherwise, and notifies the association to make up the deficiency by assessment on its shareholders or a receiver will be appointed, such assessment is to be made by the shareholders or directors of the association. In our opinion, the language of the section plainly implies that, upon receiving such notice, the association may elect to either continue in business by increasing the amount of the investment, or go into voluntary or involuntary liquidation, and, as this question affects the shareholders alone, they, and not the directors, are entitled to determine the course that shall be pursued. The individual liability of the shareholders in a national bank is fixed by statute at the par value of the stock held by each, in addition to the amount invested in such shares, (§ 5151), and does not arise except in case of liquidation and for the purpose of winding up the affairs of the institution. There is no legal obligation on their part to pay an additional assessment necessary to repair the capital stock, unless it is voluntarily authorized by them. Their only obligation, when notice is given by the Comptroller of the Currency of the impairment of the capital stock of the bank, is either to assess themselves and make up the deficiency,

and thus increase their investment, or to go out of business, and we think, the law contemplates that this right shall be exercised by them alone. If they desire and elect to continue in business they must make up the deficiency, but they are, in our opinion, at liberty to take the other alternative and allow the corporation to go into liquidation. The question is a Federal one, and, so far as we are advised, has never been directly passed upon by the Supreme Court of the United States. In *Delano v. Butler*, 118 U. S. 634, the court was called upon to decide whether payments made upon assessments voluntarily levied by the shareholders, under U. S. Rev. St., § 5205, could be applied in the discharge of subsequent assessments made by the comptroller in final liquidation of the bank, under section 5151. It was held that they could
85 not. Mr. Justice Matthews' opinion proceeds on the theory that the assessment contemplated by section 5205 is one to be imposed on the shareholders by their own vote for the purpose of restoring their lost capital as a consideration for the privilege of continuing its business, while, under section 5151, the shareholders may be compelled to discharge their individual responsibility for contracts, debts and engagements of the association. He says: "The assessment as made under section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment of the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and in the ordinary course of business certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas under section 5151, the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably." These remarks are, of course, not authoritative, because they were not necessary to the decision of the case, but they are, nevertheless, very persuasive, and indicate the views of the learned justice, if not the entire court. In *Hulitt v. Bell*, 85 Fed. 98, the circuit court of the United States for the southern district of Ohio, in an able and well-reasoned opinion by Judge Sage, held that an assessment levied by a board of directors of a national bank to make up a deficiency in its capital stock, under sections 5205, was invalid and not within the power of the directors, but should have been made by the shareholders themselves. After referring to the duties and powers of the directors as provided in the bank act, he says: "The assessment in question does not fall within any of these powers. It does
86 not come under the head of incidental powers necessary to carry on the business, nor is it included in the conduct of general business. It is a provisions for a special emergency, so unusual and of such importance as to make it necessary for the association to consider and determine whether it will continue in business or wind up its affairs. The impairment of the capital may have

resulted from inefficiency or incapacity or the fault or wrong of the directors under whose administration of the affairs of the bank it occur-ed. Their holdings of the capital stock may be but a small proportion of the entire amount. They ought not to exercise control over a matter so vital, unless the statute gives it to them in unmistakable terms." It is argued that the opinion of the court upon this point is entitled to but little weight because the case could have been, and was, decided upon another point. The validity of the assessment was directly involved in the case, argued by counsel and considered and passed upon by the court, and, if the opinion of Judge Sage is *dictum* at all, it should, as said by Mr. Justice Cassiday, in *Buchner v. Chicago, M. & N. W. R'y Co.*, 60 Wis. 264, "be regarded as 'judicial *dictum*,' in contradistinction to mere *obiter dictum*." It was not a mere argument or illustration of some collateral question, but was the opinion of the court upon a litigated point in the case, and is entitled to be considered and recognized as such.

The judgment of the court below will therefore be affirmed.

87 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 3rd day of March 1902,

Present: Hon. Robert S. Bean, chief justice, Hon. Frank A. Moore, associate justice, Hon. Charles E. Wolverton, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Saturday the 3rd day of May 1902, the same being the 34th judicial day of said term:

HENRY WEINHARD, Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Appellant.
} Appeal from Multomah County.

This cause having heretofore to-wit:—on the 23rd day of April 1902, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon and being now fully advised in the premises finds that there is not error as alleged. It is therefore considered, ordered and adjudged that the judgment in this cause in the court below rendered be and the same hereby is in all things affirmed.

And it appearing that the appellant filed an undertaking for the appeal with R. Lea Barnes as surety therein, it is further ordered and adjudged that the respondent recover of appellant and R. Lea Barnes its said surety, his costs and disbursements in this court upon the appeal allowed and taxed at $45.00.

It is further ordered that the cause be remanded to the said court below and that a judgment be there entered and docketed in accordance herewith.

88 In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Appellant.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said action certified to and filed with our said court as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the county of Multnomah from which the said appeal was taken, and is the record and transcript upon which said appeal was heard, and the judgment of our supreme court entered thereon on the 3rd day of May 1902.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the judgment of our said supreme court upon the said appeal entered on the said 3rd day of May 1902, and a full, true and correct copy of the opinion of the court filed on said 3rd day of May 1902, and upon which said judgment was entered.

I further certify that the petition for a writ of error in said cause and the endorsement thereon: the bond thereon, its approval and endorsements thereon: the order allowing the writ of error: the citation and proof of service endorsed thereon, the assignment of errors, the writ of error, and allowance thereof, all which are attached to the above and foregoing, are the original petition, bond, order, citation, assignment of errors and writ lodged with and now in my office: and I do certify that the above and foregoing are such original papers so lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said court as the same appears of record and on file in my office.

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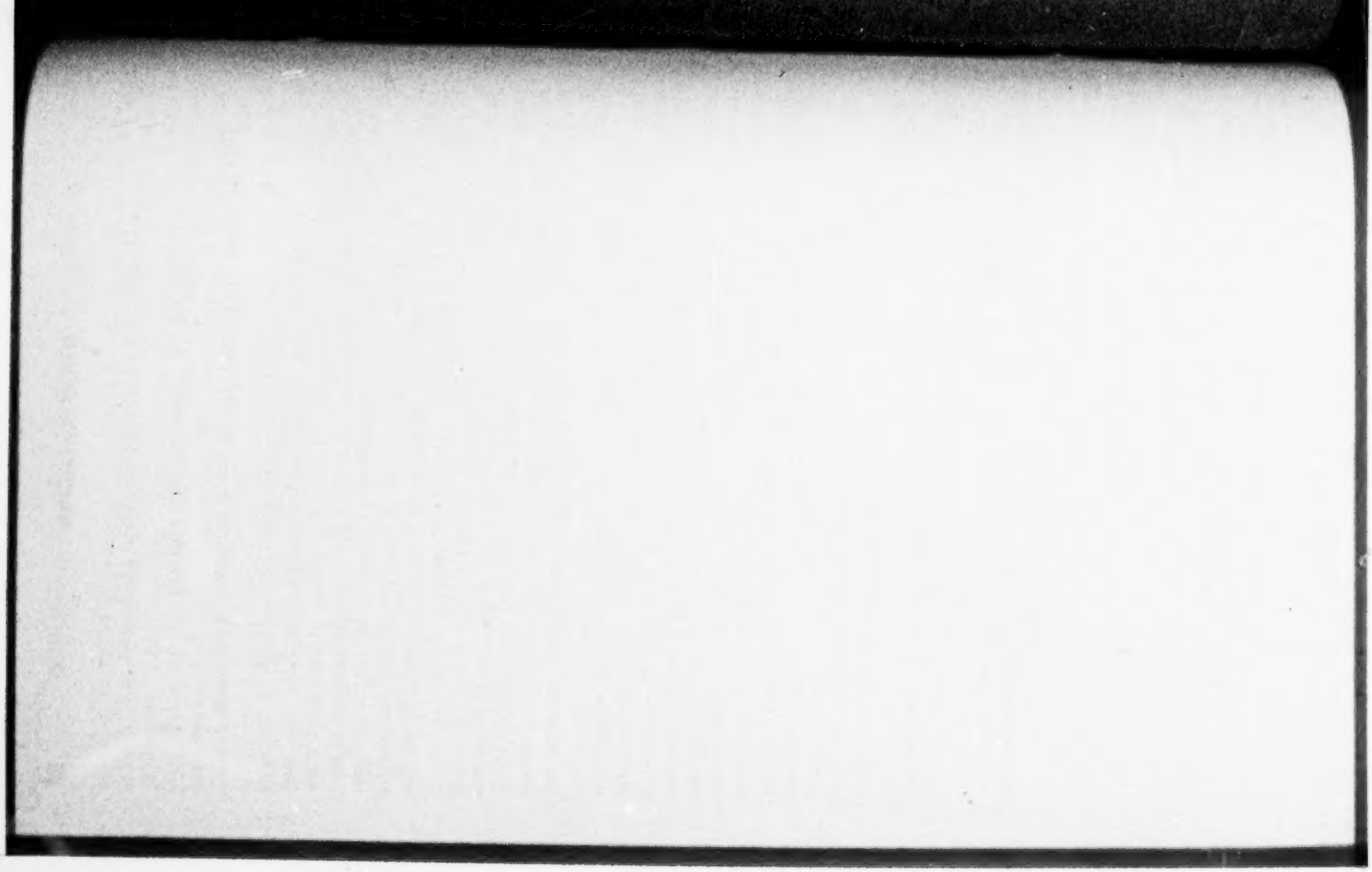
I further certify that the cost of the foregoing return to the writ of error is $36.00 and that said amount was paid by Messrs. Platt & Platt for the plaintiff in error.

In witness whereof, I have hereunto set my hand and the seal of the supreme court of the State of Oregon, at my office in the city of Salem, in said State, this the 22nd day of July 1902.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 18,640. Oregon supreme court. Term No. 109. Commercial National Bank of Portland, plaintiff in error, *vs.* Henry Weinhard. Filed August 6th, 1902.



(18,641.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 110.

COMMERCIAL NATIONAL BANK OF PORTLAND, PLAINTIFF IN ERROR,

vs.

GEORGE H. WILLIAMS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 7, 1903.

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a In the Supreme Court of the State of Oregon, ss:

GEORGE H. WILLIAMS, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Defendant and Appellant.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the above entitled cause, with all things concerning the same.

July 22nd, 1902.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

b In the Supreme Court of the United States.

COMMERCIAL NATIONAL BANK OF PORTLAND, Plaintiff in Error,
vs.
GEORGE H. WILLIAMS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Oregon before you or some of you, being the highest court of said State in which a decision could be had in the said action between George H. Williams, plaintiff and respondent, and defendant in error, and The Commercial National Bank of Portland, a corporation, defendant and appellant, and plaintiff in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privileges and exemption specially set up and claimed under such statute; a manifest error hath happened to the great damage of the said Commercial National Bank of Portland, plaintiff in error, as by its complaint appears; and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judg-
c ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being

inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of June, 1902

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States for the District of Oregon,
By G. H. MARSH,
Deputy Clerk.

Allowed by
R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

d STATE OF OREGON, *County of Multnomah,* } ss:

Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Portland, Oregon, this 26th day of June, 1902.

TH. O'DAY,
Of Attorneys for Defendant — Error, George H. Williams.

STATE OF OREGON, *County of Marion,* } ss:

Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Salem, Oregon, this 25th day of June, 1902.

J. J. MURPHY,
Clerk of the Supreme Court of Oregon.

e [Endorsed:] No. —. In the Supreme Court of the United States Commercial National Bank of Portland plaintiff in error, *vs.* George H. Williams defendant in error. Writ of error. Filed June 27 1902 J. J. Murphy, clerk. By —— ——, deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for plaintiff in error.

f In the Supreme Court of the State of Oregon.

GEORGE H. WILLIAMS, Plaintiff and Respondent,
vs.
THE COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.
} Petition for Writ of Error.

To the Honorable Robert S. Bean, chief justice of the supreme court of the State of Oregon:

And now comes Commercial National Bank of Portland, a corporation, appellant, by Harrison G. Platt and Robert T. Platt, and

E. S. Pillsbury, its attorney, and says that on or about the 3d day of May 1902, the said supreme court of the State of Oregon rendered and entered a judgment in the above entitled cause in favor of the above named plaintiff and respondent and against defendant and appellant, as will appear by reference to the record and proceedings in said cause, in which judgment and decision and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of defendant and appellant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, defendant prays that a writ of error issue in this behalf returnable into the Supreme Court of the United States for the correction of error complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

E. S. PILLSBURY,
HARRISON G. PLATT,
ROBERT T. PLATT,
Attorneys for Petitioner.

g [Endorsed:] No. —. In the supreme court of the State of Oregon George H. Williams plaintiff & respondent *vs.* Commercial National Bank of Portland, defendant & appellant Petition for writ of error Filed June 25 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland Oregon. attorneys for defendant

h In the Supreme Court of the State of Oregon.

GEORGE H. WILLIAMS, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.

Order Allowing Writ of Error.

This 25th day of June, 1902, came the defendant and appellant by its attorneys Harrison G. Platt and Robert T. Platt and E. S. Pillsbury, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it, praying also that transcript of the record and proceedings and papers upon which the decision and judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and such other and further proceedings may be had as may be proper in the premises. On consideration whereof the said writ is hereby allowed upon the said appellant giving bonds according to law in the sum of $500.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

i [Endorsed:] No. —. In the supreme court of the State of Oregon. George H. Williams, plaintiff & respondent, *vs.* Commercial National Bank of Portland, defendant & appellant. Order allowing writ of error. Filed June 25th, 1902 J. J. Murphy clerk. By —— ——, deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon attorneys for defendant.

j In the Supreme Court of the State of Oregon.

GEORGE H. WILLIAMS, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.

Know all men by these presents: That Commercial National Bank of Portland, the plaintiff in error in the above entitled cause on writ of error to the Supreme Court of the United States, as principal, and R. Lea Barnes, and John E. Miles, as sureties, are held and firmly bound unto George H. Williams, plaintiff and respondent in the supreme court of the State of Oregon and defendant in error on writ of error to the Supreme Court of the United States, in the full sum of five hundred dollars, to be paid to the said George H. Williams, his certain attorneys, executors, administrators, and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of June, 1902.

Whereas, lately, at the session of the supreme court of the State of Oregon, in an action pending in said court between George H. Williams, plaintiff and respondent, and Commercial National Bank of Portland, defendant and appellant, a final judgment was rendered against the said Commercial National Bank of Portland, and the said Commercial National Bank of Portland having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of said supreme court of the
k State of Oregon to reverse the judgment in the aforesaid action, and a citation directed to said plaintiff and respondent, citing and admonishing him to be and appear at a session of the Supreme Court of the United States at Washington, within sixty days from the date hereof;

Now, therefore, the condition of this obligation is such, that if the said Commercial National Bank of Portland, plaintiff in error, shall prosecute said writ of error to effect, and answer all costs if it shall fail to make its said plea good, then this obligation to be void, else to remain in full force and virtue.

COMMERCIAL NATIONAL BANK
OF PORTLAND,
By HARRISON G. PLATT, *Attorney.*
R. LEA BARNES. [SEAL.]
JNO. E. MILES. [SEAL.]

Signed, sealed and delivered in presence of
HARRISON G. PLATT.

l STATE OF OREGON, } ss:
County of Multnomah, }

I, R. Lea Barnes, and I, John E. Miles, whose names are subscribed to the within undertaking as sureties, being duly sworn, each for himself, say:

That I am a resident and freeholder within the State of Oregon, and am not an attorney or counselor at law, sheriff clerk or officer of any court, and am worth the sum of five hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

R. LEA BARNES.
JNO. E. MILES.

Subscribed and sworn to before me this 25th day of June, 1902.

[Seal of Harrison G. Platt, Notary Public, State of Oregon.]

HARRISON G. PLATT.
Notary Public for Oregon.

Approved June 25th, 1902.
By R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

m [Endorsed:] No. —. In the supreme court of the State of Oregon George H. Williams plaintiff & respondent *vs.* Commercial National Bank of Portland defendant & appellant Undertaking Filed June 25th 1902 J. J. Murphy, clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

n In the Supreme Court of the State of Oregon.

GEORGE H. WILLIAMS, Plaintiff & Respondent and Defendant in Error,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant and Plaintiff in Error.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To George H. Williams, plaintiff and defendant in error, and to Thomas O'Day and L. H. Tarpley, your attorneys, Greeting:

Whereas, the Commercial National Bank of Portland, a corporation, has lately obtained a writ of error to the Supreme Court of the United States from a judgment rendered in the supreme court of the State of Oregon, in your favor, and has given the security required by law, you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to said writ of error, wherein

said Commercial National Bank of Portland is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert S. Bean, chief justice of the supreme court of the State of Oregon this 25th day of June, 1902.

[Seal Supreme Court, State of Oregon.]

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

Attest: J. J. MURPHY, *Clerk.*

o UNITED STATES OF AMERICA, } ss:
District of Oregon, }

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 26th day of June, 1902.

THOS. O'DAY,
Of Attorneys for Plaintiff & Respondent, George H. Williams.

p [Endorsed:] No. —. In the supreme court of the State of Oregon George H. Williams plaintiff & respondent *vs.* Commercial National Bank of Portland defendant & appellant Citation Filed June 27 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

q In the Supreme Court of the State of Oregon.

GEORGE H. WILLIAMS, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant.

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

Now at this time comes The Commercial National Bank of Portland, defendant and appellant in the above entitled cause, and plaintiff in error to the Supreme Court of the United States by its attorneys Harrison G. Platt and Robert T. Platt and E. S. Pillsbury and presents the following assignment of errors and prayer for reversal of the decision in the above entitled case in this court by the Supreme Court of the United States:

First. The supreme court of the State of Oregon erred in holding the complaint herein good as against the demurrer thereto of defendant and in not sustaining said demurrer.

Second. The supreme court of the State of Oregon erred in sus-

taining plaintiff's demurrer to defendant's first, further and separate answer.

Third. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to the second, further and separate answer of defendant.

Fourth. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to the third, further and separate
r answer of defendant.

Fifth. The supreme court of the State of Oregon erred in denying defendant's motion for a non-suit.

Sixth. The supreme court of the State of Oregon erred in holding that section 5205 Revised Statutes of the United States did not give defendant the right by action of its board of directors to levy an assessment to restore impaired capital stock.

Seventh. The supreme court of the State of Oregon erred in holding that the acts and proceedings of defendant in assessing the stock of plaintiff were not authorized by section 5205 United States Revised Statutes.

Eighth. The supreme court of the State of Oregon erred in holding that the acts and proceedings of defendant in selling the stock of plaintiff were not authorized by section 5205 United States Revised Statutes.

Ninth. The supreme court of the State of Oregon erred in holding that the assessment levied by the board of directors of defendant bank to make up the impairment in its capital stock under section 5205 United States Revised Statutes, was invalid and not within the power of the directors.

Tenth. The supreme court of the State of Oregon erred in holding that defendant wrongfully converted plaintiff's shares of stock.

Eleventh. The supreme court of the State of Oregon erred in awarding judgment in favor of plaintiff and against defendant and in not awarding judgment against plaintiff and in favor of defendant.

s And by reason of the foregoing errors and holdings the appellant prays that said judgment may be reversed and that a mandate be entered directing that a judgment be entered in favor of defendant and plaintiff in error for its costs and disbursements and that it may be restored to all things which it has lost by reason of said judgment.

E. S. PILLSBURY,
HARRISON G. PLATT,
ROBERT T. PLATT,
Attorneys for Commercial National Bank of Portland, Oregon, Defendant and Appellant and Plaintiff in Error.

t [Endorsed:] No. —. In the supreme court of the State of Oregon George H. Williams plaintiff & respondent *vs.* Commercial National Bank of Portland defendant & appellant Assign-

ment of errors. Filed June 25th 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

Transcript.

GEORGE H. WILLIAMS, Plaintiff & Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Defendant & Appellant.

Appeal from the circuit court, Multnomah county.

Before Hon. Alfred F. Sears, Jr., and Hon. Arthur L. Frazer, judges, sitting in joint session.

O'Day & Tarpley, attorneys for respondent.
E. S. Pillsbury and Platt & Platt, attorneys for appellant.

1 Be it remembered, that heretofore and on the 14th day of February, A. D. 1899, there was filed in the office of the clerk of the circuit court for the county of Multnomah, State of Oregon, a

Complaint

in words and figures as follows, to-wit:—

In the Circuit Court of the State of Oregon for Multnomah County.

GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant. } Complaint.

The plaintiff complains of defendant and for cause of action alleges:—

That at all the times hereinafter stated the defendant was and still is a corporation, duly incorporated under the national banking laws of the United States and located at Portland, Oregon, engaged in a general banking business.

That for a long time before and until the time hereinafter mentioned, the plaintiff was lawfully possessed and was the owner of sixty shares of the capital stock of said defendant corporation, fully paid up, of the aggregate par value of $6,000.00.

That on or about October 5th, 1896, the board of directors of said bank, without any lawful authority therefor, adopted a series
2 of resolutions recommending and requesting the Comptroller of the Currency to call for an assessment of 50 % on the capital stock of said bank, in accordance with the authority conferred upon him by sec. 5205 of the Revised Statutes of the United States, claiming that the capital stock of said bank had been im-

paired, and afterwards, on or about December 5th, 1896, the Comptroller of the Currency, in compliance with the said request of said board of directors, gave notice to the defendant association that its capital stock had become impaired to an extent which made necessary an assessment thereon of $250,000, that being 50 % assessment on the face value of the capital stock of said defendant.

That thereafter and subsequent to the receipt of said notice, the board of directors of the defendant corporation, without any lawful authority therefor, passed a resolution as follows:—

"In accordance with the notice served upon this association by the Comptroller of the Currency, under date of December 5th, 1896, and received by this bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this bank of 50 % or $50.00 per share, payable at this bank on or before March 11th, 1897." And further resolved, "That the cashier of this bank be and he is hereby authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail."

3 That the above resolution and all and each and every act of said board of directors was done without the authorization or direction of the stockholders of said bank, and no shareholders' or stockholders' meeting was held for the purpose of authorizing said assessment or determining what action, if any, should be taken with reference to the said notice for assessment, given by the Comptroller of the Currency as aforesaid.

The amount of the assessment of the stock of this plaintiff, made by the board of directors as above set forth, was the sum of $3,000.00 and that thereafter, to-wit:—on or about the 5th day of May, 1897, said defendant association, without any lawful authority therefor, undertook to and did sell and dispose of said plaintiff's sixty shares of the capital stock of defendant for the purpose of paying said pretended and illegal assessment, this plaintiff having refused to pay the same, and denying the authority of said board of directors to levy said assessment; and this plaintiff alleges that under section 5205 of the Revised Statutes of the United States, the board of directors of said defendant had no authority or right to make said or any assessment on the stock or shares of this plaintiff, but said assessment could only be made by order of the shareholders of defendant at a shareholder's meeting, and not otherwise, and that said assessment is void.

That notwithstanding the premises and the want of authority on the part of said board to make said assessment and sale, said
4 defendant proceeded to and did advertise and sell said sixty shares of stock of this plaintiff as hereinbefore stated, and did thereby convert same to the use and benefit of the defendant, and did thereby unlawfully and without the consent of this plaintiff deprive the plaintiff of the use and possession of said stock and the proceeds thereof, and did thereby oust said plaintiff as a shareholder or stockholder of said defendant association, to his damage in the

sum of $6,000: that said sum of $6,000.00 was the reasonable value of said stock at the time of said wrongful sale and conversion by said defendant.

That by virtue of the wrongful act of said defendant association, this plaintiff ceased to be a shareholder in said bank, and ceased thereafter to participate in the profits and emoluments of said defendant.

Wherefore, plaintiff prays judgment against said defendant for said sum of $6,000.00 with interest thereon from May 5th, 1897, together with his costs and disbursements herein.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } ss:

I, George H. Williams, being first duly sworn, depose and say that I am the plaintiff in the above entitled action; and that the foregoing complaint is true as I verily believe.

5 GEO. H. WILLIAMS.

Subscribed and sworn to before me this 13th day of February, 1899.

THOMAS O'DAY,
[SEAL.] *Notary Public for the State of Oregon.*

And afterwards, on the 24th day of February, 1899, there was filed in the office of said clerk, a

Motion to Strike Out Parts of Complaint

in words and figures as follows, to-wit:—

(Title.)

Comes now the defendant above named, appearing by Platt & Platt, its attorneys, and moves the court:—

First. To strike out all that portion of the complaint contained within lines twenty-two (22) to twenty-nine (29), both inclusive, of page one (1) thereof, on the ground and for the reason that the same is incompetent, irrelevant, immaterial, sham and frivolous:

6 Second. To strike out the following paragraph from lines one and two (1 & 2) of page two (2) of the complaint, to-wit: "in compliance with the said request of said board of directors," on the ground and for the reason that the same is incompetent, immaterial, irrelevant, sham and frivolous;

Third. To strike out all that portion of the complaint contained between the words "and this" in line eleven (11) on page three (3) thereof, and the word "void" in line eighteen (18) of page three (3) of said complaint, on the ground and for the reason that the same is incompetent, redundant and a conclusion of law.

PLATT & PLATT,
Attorneys for Defendant.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 24th day of February, 1899, by receiving a copy thereof duly certified to as such by Robert Treat Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

7 And afterwards, on Monday, the 13th day of March, 1899, the same being the 6th judicial day of the March term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time this cause coming on for hearing on motion of defendant to strike out certain parts of plaintiff's complaint, plaintiff appearing by Thomas O'Day and George H. Williams, Esqs., of his attorneys, and the defendant appearing by Robert T. Platt of Platt & Platt, its attorneys, and argument having been heard, and the court being fully advised, said motion is granted as to the first and second parts thereof, and denied as to the third; and in pursuance thereof all that portion of the complaint is hereby stricken out contained between line twenty-two (22) and twenty-nine (29), both inclusive of page one (1) thereof, and the following paragraph in lines one and two (1 & 2) of page two (2), to-wit:— "in compliance with the said request of said board of directors."

The plaintiff is hereby given five days from and after the entry of this order within which to file an amended complaint herein.

Dated March 13th, 1899.

(Signed) ALFRED F. SEARS, JR., *Judge.*

8 And afterwards, on the 13th day of April, 1899, there was filed in the office of said clerk, a

Demurrer

in words and figures as follows, to-wit:—

(Title.)

Comes now the defendant above named, appearing by Platt & Platt, its attorneys, and demurs to plaintiff's complaint on file herein, on the ground and for the reason that the same does not state facts sufficient to constitute a cause of action in favor of said plaintiff, and against this defendant.

PLATT & PLATT,
Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within demurrer is hereby accepted in Multnomah county, Oregon, this 13th day of April, 1899, by receiving a copy thereof duly certified to as such by Robert Treat Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

9 And afterwards, on Monday, the 8th day of May, 1899, the same being the 7th judicial day of the May term of said court, there was rendered and entered the following

Order

in words and figures as follows, to wit:—

(Title.)

Now at this time this cause coming on to be heard upon defendant's demurrer to plaintiff's complaint, the same having been heretofore argued and taken under advisement by the court, plaintiff appearing by Thomas O'Day Esq., of his attorneys and defendant appearing by Platt & Platt its attorneys, and the court being at this time fully advised, it is

Considered and ordered that the said demurrer be and the same hereby is overruled, and the defendant given five days from and after this date within which to file its answer to plaintiff's complaint.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on the 17th day of June, 1899, there was filed in the office of said clerk, an

Answer

in words and figures as follows to wit:—

10 (Title.)

The defendant for answer to the complaint on file in the above entitled cause, admits, denies and alleges as follows:—

1. Denies that the board of directors of the defendant corporation ever at any time without any lawful authority therefor passed the resolution set forth in the said complaint or any resolution. And in this behalf the defendant alleges that on or about the 11th day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in words and figures following:—

"TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec.* 5, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency, that the capital stock of the Commercial National Bank of Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000.) upon the shareholders of said association to make good such deficiency.

Now therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for
11 three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKLES,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon."

And the said defendant further alleges that under and by virtue of section 5205 of the Revised Statutes of the United States, in thereupon became and was the duty of the said board of directors within three months after receiving from the Comptroller of the Currency the said notice that the capital stock of the defendant had become impaired to an extent which made necessary an assessment thereon of $250,000., either to collect the said sum of $250,000., by assessment upon the stockholders of the defendant *pro rata* for the amount of capital stock held by each, or to cause the defendant to go into liquidation, under penalty of having a receiver appointed by the Comptroller of the Currency to close up the business of the defendant, and that under and by virtue of the said section 5205 of the Revised Statutes of the United States the said board of
12 directors was vested with the authority and power to determine whether the defendant should pay up the said sum of $250,000 by assessment upon the shareholders of the defendant as aforesaid, or should go into liquidation; and that pursuant to and in the exercise of the said authority and power, and not otherwise, the said board of directors, on or about the 14th day of December, 1896, passed the resolution which is set forth in the said complaint, and levied upon all the shareholders of the defendant as assessment

of fifty per cent. of the par value of their stock or fifty dollars per share.

II. Admits that no shareholders' or stockholders' meeting was held prior to the time when the said resolution was passed for the purpose of authorizing the said assessment, or of determining what action, if any, would be taken with reference to the said notice for assessment given by the Comptroller of the Currency as aforesaid, but denies that the said resolution was passed or that any act of the said board of directors was done without the authorization of the stock holders of defendant corporation. And in this behalf, the defendant alleges that the directors constituting the said board were elected as such directors by the shareholders and stockholders of the defendant within one year prior to the said 14th day of December, 1896, and that the term of office for which the said directors were elected had not expired on the said 14th day of December, 1896, and that by virtue of the said election, and under and by virtue of section 5145 of the Revised Statutes of the United States, the said board of directors was authorized and empowered by the
13 stockholders of the defendant to pass the *the* said resolution, and to levy the said assessment.

III. Admits that the plaintiff refused to pay the said assessment and that on or about the 5th day of May, 1897, the defendant undertook to and did sell and dispose of the plaintiff's sixty shares of the capital stock of the defendant for the purpose of paying the said assessment but denies that the defendant association without any lawful authority therefor, undertook to or did sell or dispose of any share or shares of the capital stock of the defendant which belonged to the plaintiff, for the purpose of paying any pretended or illegal assessment or any assessment or for any purpose or at all, and denies that the said assessment was pretended or illegal or that under section 5205 of the Revised Statutes of the United States the board of directors of said defendant had no authority or right to make the said or any assessment on the stock or shares of the plaintiff, and denies that under section 5205, or any section of the Revised Statutes of the United States, or under any law of the United States, said assessment could only be made by order of the shareholders of the defendant at a shareholders' meeting and not otherwise, and denies that under section 5205 or any section, of the Revised Statutes of the United States, or under any law of the United States the said assessment or any part or any portion thereof, ever was or now is void, or that under section 5205 or any section of the Revised Statutes of the United States or under any law of the United States, there ever was any want of authority on the part of the said board of directors to make said assessment and sale, or to make the said assessment, or to make the said sale.

14 IV. Denies that the defendant ever at any time proceeded to or did advertise or sell the sixty shares of stock of the plaintiff or any shares of stock belonging to the plaintiff, except as stated in this answer, and denies that the defendant ever at any time or at all unlawfully and without the consent of the plaintiff, or

unlawfully or without the consent of the plaintiff, deprived the plaintiff of the use and possession, or of the use, or of the possession of the said stock, or of the proceeds thereof, or of any stock, or of the proceeds of any stock, or unlawfully and without the consent of the plaintiff, or unlawfully or without the consent of the plaintiff, ousted the said plaintiff as a shareholder or stockholder of said defendant association, to his damage in the sum of $6,000., or ousted the said plaintiff as a shareholder or stockholder of said defendant association, or caused the plaintiff damage in the sum of $6,000., or in any sum or at all.

V. Alleges that thereafter, to-wit:—on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution passed by the said board of directors on the 14th day of December, 1896, and of the said assessment thereby levied upon the shareholders of the defendant, to be served upon the plaintiff and also upon each and every shareholder of the defendant; that prior to the 12th day of January, 1897, the said plaintiff and each and every stockholder of the defendant received, and had actual notice of the said resolution and of the said assessment; that the plaintiff failed
15 and neglected to pay the said assessment or any part or portion thereof or to pay to the defendant any sum of money whatever on account of the said or any assessment in pursuance of the said notice received by the defendant as aforesaid from the Comptroller of the Currency; that thereafter, to-wit:—on the 18th day of March, 1897, at a meeting of the board of directors of the defendant which had been duly and regularly called and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board of directors was present and voted, the said board of directors passed a resolution wherein and whereby the said board of directors voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897 at 3:30 p. m. a sufficient amount of the said sixty shares of the capital stock of the defendant belonging to the plaintiff to make the amount of said assessment upon the said sixty shares of stock, to-wit:—the sum of $3,000. that the said board of directors before the said sale gave due and legal notice thereof as required by the laws of the United States; that in pursuance of the said resolution the plaintiff's sixty shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 p. m. at the banking house the defendant in the city of Portland, State of Oregon; that at the said sale the defendant received for the said sixty shares of stock, the sum of $3,000. and no more; and that the whole number of the said sixty shares of stock was the least amount of the said sixty shares of stock which would make the amount of the said assessment thereon.

16 VI. Alleges that under and by virtue of the laws of the United States in such cases made and provided and particularly under and by virtue of section 5205 of the Revised Statutes of

the United States the said board of directors was authorized and empowered to pass the said resolution which was passed on the 18th day of March, 1897, as aforesaid, and to make and cause to be made the said sale which was made on the 5th day of May, 1897, as aforesaid.

VII. Denies that the sum of $6,000. was the reasonable value of the said sixty shares of stock on the 14th day of December, 1896, or at any time thereafter, and denies that on the 14th day of December, 1896, or at any time thereafter, prior to the said sale, or at the time of said sale, the said sixty shares of stock were of any value whatever and denies that the reasonable value of the said sixty shares of stock at any time after the said sale was greater than $3,000. Denies that the plaintiff has been damaged by any act or acts of the defendant in the sum of $6,000. or in any sum or at all.

VIII. Denies that the said sale or that the said conversion or that any sale, or any conversion, of the said sixty shares of stock by the defendant was wrongful, or that by virtue of any wrongful act of the defendant association the plaintiff ceased to be a shareholder in said bank, or a shareholder of the defendant, or ceased thereafter or at any time to participate in the profits and emoluments or in the profits or in the emoluments of the defendant, and denies
17 that any profits or any emoluments have ever at any time since the 14th day of December, 1896, accrued to or been received by the defendant.

And for a first, further and separate answer and defense to plaintiff's complaint, this defendant alleges:—

1. That on the said fifth day of December, 1896, the Comptroller of the Currency of the United States served a notice upon the defendant association which was and is in the words and figures following:—

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank,—Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency:

Now therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver shall be appointed to close up the business of the association,
18 according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to *to* these presents at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKLES,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

II. That said notice was received by defendant association on the 11th day of December, 1896.

III. And the said defendant further alleges that under and by virtue of section 5205 of the Revised Statutes of the United States, it thereupon became and was the duty of the said board of directors within three months after receiving from the Comptroller of the Currency the said notice that the capital stock of the defendant had become impaired to an extent which made necessary an assessment thereon of $250,000, either to collect the said sum of $250,000, by assessment upon the stockholders of the defendant *pro rata* for the amount of the capital stock held by each, or to cause the defendant to go into liquidation under penalty of having a receiver appointed by the Comptroller of the Currency to close up the business of the defendant; and that under and by virtue of said section 5205 of the Revised Statutes of the United States, the said board of direct-
19 ors was vested with the authority and power to determine whether the defendant should pay up the said sum of $250,000 by assessment upon the shareholders of the defendant as aforesaid, or should go into liquidation; and that pursuant to and in exercise of the said authority and power and not otherwise, the said board of directors on the 14th day of December, 1896, at a regular meeting of the board of directors of defendant association duly and regularly called and held, a quorum being present, unanimously passed the resolution which is set forth in the complaint, levying an assessment upon the shareholders of said association of fifty per cent. of the par value thereof or fifty dollars per share payable at the banking house of the defendant association, on or before March 11th, 1897, and directing that the cashier of defendant association be authorized to serve upon each shareholder of defendant association, a legal notice of the above assessment, by sending such notice to each shareholder's address by registered mail;

IV. Admits that no shareholders' or stockholders' meeting was held prior to the time when the said resolution was passed for the purpose of authorizing the said assessment or of determining what action, if any, should be taken with reference to the said notice for assessment given by the Comptroller of the Currency as aforesaid, but alleges that the said resolution was passed and that every act of the said board of directors was done with and by the authorization of the stockholders of the defendant corporation. And in this behalf the defendant alleges that the directors constituting the said

board were elected as such directors by the shareholders and
20 stockholders of the defendant within one year prior to the said 14th day of December, 1896, and that the term of office for which the said directors were elected had not expired on the said 14th day of December, 1896, and that by virtue of the said election, and under and by virtue of section 5145 of the Revised Statutes of the United States, the said board of directors was authorized and empowered by the stockholders of the defendant to pass said resolution, and to levy the said assessment.

V. That thereafter and on the 17th day of December, 1896, the defendant association acting by and through its cashier served notice of the plaintiff and each shareholder of defendant association of said assessment by sending a certified copy of said resolutions of said board of directors through the United States mail, addressed to the plaintiff and each shareholder, at their regular addresses by registered mail, postage fully prepaid;

VI. That in and by the terms of said notice of the said Comptroller of the Currency and the said resolution of said board of directors, plaintiff was required to pay to defendant association fifty per cent. upon his said stock amounting to three thousand dollars, on or before the 11th day of March, 1897;

VII. That prior to the 12th day of January 1897, the said plaintiff and each and every shareholder of the defendant received and had actual notice of the said resolution and of the said assessment;

VIII. That plaintiff did not pay to defendant association the said assessment or any part or portion thereof or the said sum of three thousand dollars or any sum or sums whatsoever on or before
21 the 11th day of March, 1897, and has never paid said sum nor any part thereof; or paid to the defendant any sum of money whatever on account of the said or any assessment in pursuance of the said notice received by the defendant as aforesaid from the Comptroller of the Currency.

IX. That thereafter, to-wit:—on the 18th day of March, 1897, at a meeting of the board of directors of the defendant which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon and at which a quorum of the said board of directors was present and voted, the said board of directors passed a resolution wherein and whereby the said board of directors voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the said sixty shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the said assessment upon the said sixty shares of stock, to-wit:—the sum of $3,000; that the said board of directors before the said sale gave due and legal notice thereof as required by the laws of the United States; that in pursuance of said resolution the plaintiff's said sixty shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 p. m. at the banking house of the de-

fendant in the city of Portland, State of Oregon; that at the said sale, the defendant received for the said sixty shares of stock
22 the sum of $3,000 and no more, and that the whole number of the said sixty shares of stock was the least amount of the said sixty shares of stock which would make the amount of said assessment thereon.

X. Alleges that under and by virtue of the laws of the United States in such cases made and provided and particularly under and by virtue of section 5205 of the Revised Statutes of the United States, the said board of directors was authorized and empowered to pass the said resolution — was passed on the 18th day of March, 1897, as aforesaid, and to make and cause to be made the said sale which was made on the 5th day of May, 1897, as aforesaid.

And for a second further and separate answer to the said complaint and by way of a separate and distinct defense to the cause of action therein set forth, the defendant alleges as follows:—

I. On or about the 11th day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in the words and figures following:—

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency.

23 Now therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKLES,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

II. Thereafter, to-wit: on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant, which has been duly and regularly called, and which was duly and reg-

ularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board was present and voted, the said board of directors passed a resolution which was and is in words and figures following:—

24 Whereas, the board of directors of this bank did, on October 5th, 1896, adopt a series of resolutions recommending to the Comptroller of the Currency that he levy an assessment of fifty per centum upon the capital stock of this bank in accordance with authority conferred upon him by section 5205 of the Revised Statutes of the United States:

And whereas, in accordance with such recommendation the Comptroller of the Currency has, under date of December 5th, 1896, given notice to this association that its capital stock has become impaired to an extent which makes necessary an assessment of $250,000 upon the shareholders of this association in order to made good such deficiency;

Therefore, be it resolved, That in accordance with the notice served upon this association by the Comptroller of the Currency under date of December 5th, 1896, and received by this bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this bank of fifty per cent., or $50 per share, payable at this bank on or before March 11th, 1897:—

And resolved, That the cashier of this bank be and he is hereby authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail.

III. Thereafter, to-wit:—on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution to be served upon the plaintiff and upon each and every shareholder of the defendant and each and every shareholder of the defendant, in-

25 cluding plaintiff, received and had actual notice of the said resolution prior to the 12th day of January, 1897.

IV. That thereafter, to wit:—on the 12th day of January, 1897, at a regular meeting of the stockholders of the defendant, at which plaintiff was present and voted one R. L. Durham, who was then the vice president and managing officer of the defendant, submitted to the shareholders of defendant for action by them thereon a report containing a full and complete statement of the facts hereinbefore alleged, to-wit:—the receipt of the defendant of the said notice from the Comptroller of the Currency and the passage by the said board of directors of the said resolution.

V. At the said meeting no protest against the said action of the said board of directors of the defendant in passing the said resolution or in levying the said assessment was made; but on the contrary, the shareholders present at the said meeting, including the plaintiff, unanimously voted that the said report of the said R. L. Durham should be received and placed on file among the official reports of the officers of the defendant and should be spread at length upon the minutes of the said shareholders' meeting.

VI. The plaintiff did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying the said assessment and did not in any way object to or question the legality regularity or necessity of the said resolution or of the said assessment, but on the contrary fully and completely acquiesced therein.

26 VII. The plaintiff failed and neglected to pay the said assessment or any part or portion thereof.

VIII. Thereafter, to-wit:—on the 18th day of March, 1897, at a meeting of the board of directors of the defendant, which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which meeting a quorum of the said board of directors was present and voted, the said board of directors passed a resolution, wherein and whereby the said board voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m. a sufficient amount of the sixty shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the said assessment upon the said sixty shares of stock, to-wit:—the sum of $3,000. The said board of directors before the said sale, caused due and legal notice thereof to be given and published as required by laws of the United States in such cases made and provided; and at the time and place specified in the said last mentioned resolution caused to be sold at public auction the plaintiff's said sixty shares of the capital stock of the defendant.

IX. The said board of directors in passing the said resolution which was passed on the 18th day of March, 1897, and in causing the said sixty shares of stock to be sold, as aforesaid, relied upon the said silence of the plaintiff, at the said meeting of the
27 shareholders of the defendant which was held on the 12th day of January, 1897, and relied upon his said acquiescence in and ratification of, the said resolution passed by the said board of directors on the 14th day of December, 1896, and in the assessment therein and thereby levied. The said board of directors would not have passed the said resolution, which was passed on the 18th day of March, 1897, as aforesaid, and the said sixty shares of stock would not have been sold by the said board of directors, or by the defendant, to satisfy the said assessment, but for the said silence of the plaintiff and his said acquiescence in and ratification of the said action of the said board of directors in passing the said resolution on the 14th day of December, 1896, and in levying the said assessment. After the 14th day of December, 1896, and prior to the 18th day of March, 1897, the plaintiff well knew that the said board of directors of the defendant were relying and would rely upon the said silence of the plaintiff and the other shareholders of the defendant in regard to the said assessment, and upon the said acquiescence therein of the plaintiff and of the other shareholders of the

defendant, and upon the said ratification by the plaintiff and by the other shareholders of the defendant of the said action of the said board of directors in passing the said resolution which was passed on the 14th day of December, 1896, and in levying the said assessment and well knew that the said board of directors was about to and would, in reliance upon the said silence, acquiescence and ratification of the plaintiff and of the other shareholders of the defendant, cause the said sixty shares of the capital stock of the defendant belonging to the plaintiff to be sold as aforesaid, to satisfy the said assessment thereon.

28 That plaintiff ought not to be admitted to allege that each and every act of defendant herein set forth, was not lawful and proper, and in each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set forth in order to lead defendant to rely thereon and to act as herein set forth. By reason of the premises and of the failure of the plaintiff to protest against or object to the said assessment the plaintiff is estopped to question or dispute the legality, regularity or necessity of the said assessment or of the said sale of his said sixty shares of the capital stock of the defendant.

And for a third, further and separate answer to the said complaint, and by way of a separate answer and distinct defense to the cause of action therein set forth, the defendant alleges as follows:—

I. On or about the 11th day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in the words and figures following:—

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank, Portland, Oregon, has become impaired to an extent which

29 makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency;

Now, therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessments upon its shareholders *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury

Department, in the city of Washington and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKLES,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

II. Thereafter, to-wit:—on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant which has been duly and regularly called and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of
30 the said board was present and voted, the said board of directors passed a resolution which was and is in the words and figures following:—

Whereas, the said board of directors of this bank did, on October 5th, 1896, adopt a series of resolutions recommending to the Comptroller of the Currency that he levy an assessment of fifty per centum upon the capital stock of this bank, in accordance with authority conferred upon him by section 5205 of the Revised Statutes of the United States:—

And whereas, in accordance with such recommendation the Comptroller of the Currency has, under date of December 5th, 1896, given notice to this association that its capital stock has become impaired to an extent which makes necessary an assessment of $250,000 upon the shareholders of this association in order to make good such deficiency;

Therefore, be it resolved, That in accordance with the notice served upon this association by the Comptroller of the Currency under date of December 5th, 1896, and received by this bank on the 11th day of December 1896, an assessment is hereby levied upon the shareholders of this bank — fifty per cent. or $50. per share, payable at this bank on or before March 11th, 1897.

And resolved, That the cashier of this bank be and he hereby is authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail.

III. Thereafter to-wit:—on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution to be
31 served upon the plaintiff and upon each and every shareholder of the defendant, and each and every shareholder of the defendant, including the plaintiff, received and had actual notice of the said resolution prior to the 12th day of January, 1897.

IV. That thereafter, to-wit:—on the 12th day of January, 1897, at a regular annual meeting of the stockholders of the defendant, at which the plaintiff was present, and voted, one R. L. Durham, who was then the vice president and managing officer of the defendant, submitted to the shareholders of defendant for action by them thereon a report containing a full and complete statement of the facts hereinbefore alleged, to-wit:—the receipt by the defendant of

the said notice from the Comptroller of the Currency and the passage by the said board of directors of the said resolution.

V. At the said meeting no protest against the said action of the said board of directors of the defendant in passing the said resolution or in levying the said assessment was made; but on the contrary, the shareholders present at the said meeting, including the plaintiff, unanimously voted that the said report of the said R. L. Durham should be received and placed on file among the official reports of the officers of the defendant, and should be spread at length upon the minutes of the said shareholders' meeting.

VI. The plaintiff did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying the said assessment and did not in any way object to or ques-
32 tion the legality, regularity or necessity of the said resolution, or of the said assessment, but on the contrary fully and completely acquiesced therein.

VII. The plaintiff failed and neglected to pay the said assessment or any part or portion thereof.

VIII. Thereafter, to-wit:—on the 18th day of March, 1897, at a meeting of the board of directors of the defendant, which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant, in the city of Portland, State of Oregon, and at which meeting a quorum of the said board of directors was present and voted, the said board of directors passed a resolution, wherein and whereby the said board voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m. a sufficient amount of the sixty shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the said assessment upon the said sixty shares of stock, to-wit:—the sum of $3,000. The said board of directors before the said sale caused due and legal notice thereof to be given and published as required by the laws of the United States in such cases made and provided; and at the time and place specified in the said last mentioned resolution caused to be sold at public auction the plaintiff's said sixty shares of the capital stock of the defendant.

33 IX. Thereafter, to-wit:—on the 2nd day of October, 1897, at a special meeting of the shareholders of the defendant, which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which shareholders holding more than two-thirds of the capital stock of the defendant were present and voted, there was adopted by the shareholders present at the said meeting, a resolution that the defendant should be placed in voluntary liquidation under the provisions of section 5220 and 5221 of the Revised Statutes of the United States. The said resolution was adopted by the votes of shareholders holding more than

two-thirds of the capital stock, of the defendant. Thereafter the said board of directors caused notice of the said resolution to be certified under the seal of the defendant to the Comptroller of the Currency and to be published for a period of two months and also caused notice to be published in the manner provided by law to the effect that the defendant was closing up its affairs, and that its creditors were invited to present their claims against the defendant for payment.

Thereafter sundry claims against the defendant were presented for payment pursuant to said notice and all the claims which were so presented for payment were paid. The plaintiff did not at any time prior to the commencement of this action present any claim to or make any demand upon the defendant or notify or inform the defendant that he had or claimed to have any claim or demand against it. That thereafter, to-wit: on the 13th day of July, 1898, all the assets of the defendant were sold by the defendant to Wells-Fargo & Company, a corporation, for the sum of two hundred and fifty thousand dollars ($250,000). At the time of the said
34 sale no claims against the defendant were known to the board of directors of the defendant to be outstanding or unpaid, but on the contrary the said board of directors believed and had reason to believe that all claims against the defendant had been paid in full. Thereafter the said board of directors distributed among the shareholders of the defendant all the proceeds of the said sale of the assets of the defendant.

X. That the said board of directors in distributing among the shareholders of the defendant the said proceeds of the said sale of the assets of the defendant as aforesaid relied upon the fact that no claim or demand had been presented against the defendant which had not been settled or paid. The said board of directors would not have distributed the said proceeds of the said sale, as aforesaid, if it had not been that no claim or demand against the defendant had been presented which had not been paid. The plaintiff had full notice of the said sale of the assets of the defendant before the said board of directors distributed among the shareholders of the defendant the said proceeds of the said sale, as aforesaid the plaintiff well knew that the said board of directors were about to and would so distribute the said proceeds of the said sale, if no claim or demand against the defendant should be presented before such distribution shall take place. The plaintiff ought not to be admitted to allege that each and every act of defendant herein set forth, was not lawful and proper, and in each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defend-
ant to believe defendant's acts to be lawful and proper and to
35 act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set forth in order to lead defendant to rely thereon and to act as herein set forth. By reason of the premises the plaintiff is estopped from now presenting any claim or demand against the defendant.

Wherefore, having fully answered the plaintiff's complaint, the

defendant prays to be hence dismissed with its costs and disbursements taxed against the plaintiff.

PLATT & PLATT,
Attorneys for Defendant.

E. S. PILLSBURY, *Of Counsel.*

STATE OF OREGON,
County of Multnomah, } ss:

I, H. G. Hanley, being first duly sworn, depose and say that I am the cashier of The Commercial National Bank, of Portland, defendant in the above entitled action and that the foregoing answer is true as I verily believe.

H. G. HANLEY.

Subscribed and sworn to before me this 26th day of July, 1899.
[SEAL.]
J. D. LEONARD,
Notary Public for Oregon.

35½ STATE OF OREGON,
County of Multnomah, } ss:

I, H. G. Hanley, being first duly sworn depose and say that I am cashier of defendant bank in the above entitled action; and that the foregoing answer is true as I verily believe.

H. G. HANLEY.

Subscribed and sworn to before me this 16th day of June, 1899.
[SEAL.]
ROBERT T. PLATT,
Notary Public for the State of Oregon.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within answer is hereby accepted in Multnomah county, Oregon, this 16 day of June, 1899, by receiving a copy thereof duly certified to as such by Robert Treat Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

36 And afterwards, on the 22nd day of June, 1899, there was filed in the office of said clerk, a

Demurrer to Answer

in words and figures as follows, to-wit:

(Title.)

Comes now the above named plaintiff and demurs to the first, further and separate answer of the defendant, and the whole thereof for the reason that same does not state facts sufficient to constitute a defense to the plaintiff's complaint.

2d. Demurs to the second further and separate answer of the defendant and the whole thereof, for the reason that the same does not state facts sufficient to constitute a defense to the plaintiff's complaint herein;

3rd. Demurs to the third further and separate answer of the defendant and the whole thereof, for the reason that the same does not state facts sufficient to constitute a defense to the plaintiff's complaint herein.

37

O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within demurrer is hereby accepted in Multnomah county, Oregon, this 21st day of June 1899, by receiving a copy thereof, duly certified to as such by Thos. O'Day, attorney for plaintiff.

PLATT & PLATT,
Attorneys for Defendant.

And afterwards, on the 22nd day of June, 1899, there was filed in the office of said clerk a

Motion to Strike Out Parts of Answer

in words and figures as follows to-wit:—

(Title.)

Comes now the above named plaintiff and moves the court to strike out all that part of defendant's answer herein as follows for the following reasons, that is to say:—

1st. Commencing with the word "denies" line 17, page 1, to and inclusive of the word "share" line 10, page 3, for the reason
38 that the same is sham, frivolous, redundant disjunctive and pleads a conclusion and not a fact.

2nd. Commencing with the word "but" line 17 page 3, to and inclusive of the word "assessment" line 31, same page, for like reasons as above.

3rd. Commencing with the word "but" line 7 page 4 to and inclusive of the word "sale" line 29 same page for like reasons as above.

4th. Commencing with the word "denies" line 31, page 4 to and inclusive of the word "all" line 15 page 5 for like reasons as above.

5th. Commencing with the word "alleges" line 17, page 5, to and inclusive of the word "thereon" line 24 page 6 for like reasons as above.

6th. Commencing with the word "alleges" line 26, page 6 to and inclusive of the word "aforesaid" line 1, page 7 for like reasons as above.

7th. Commencing with the word "denies" line 14 page 7 to and inclusive of the word "defendant" line 24, page 7, for like reasons as above.

And further for the reason that the same is a conclusion of law and not a statement of fact.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 21st day of June, 1899, by receiving a copy thereof duly certified to as such by Thos. O'Day attorney for plaintiff.

PLATT & PLATT,
Attorneys for Defendant.

39 And afterwards, on Saturday the 22d day of July, 1899, the same being the 57th judicial day of the May term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

This cause having heretofore come on for hearing on plaintiff's motion to strike out certain parts of defendant's answer, and also upon plaintiff's demurrers to the first second and third further and separate answers, contained within said answer of defendant, plaintiff appearing in person and by Thos. O'Day Esq. of his attorneys and defendant appearing by Platt & Platt, its attorneys, and argument having been had, and the court being at this time, fully advised, the said motion and each and every part thereof is denied but the said demurrers and each of them are hereby sustained, and the defendant having moved the court for permission to amend the second and third separate answers and defense by interlining after the period in line 18 page 18 and after the period in line 30 page 24 thereof, the following paragraph:

"That plaintiff ought not to be admitted to allege that each and every act of defendant herein set forth was not lawful or proper, and in each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set forth in order to lead defendant to rely thereon and to act as herein set forth."

40 It is considered and ordered that the defendant have leave to amend the said two particulars by interlineation of the said paragraph upon attaching to the said answer a verification of

said answer as amended. It is further ordered that plaintiff have thirty days in which to further plead.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on the 1st day of August, 1899, there was filed in the office of said clerk, a

Reply

in words and figures as follows, to-wit:

(Title.)

Now comes the above named plaintiff and for reply to the second further and separate answer of the defendant herein,

Denies that on the 12th day of January, 1897, at a regular annual meeting of the stockholders of the defendant, at which the plaintiff was present and voted, one R. L. Durham who was then the vice president and managing officer of the defendant, submitted to the shareholders of the defendant for action by them
41 thereon a report containing a full and complete statement of the facts in said answer before alleged, to-wit:—the receipt by the defendant of the said notice from the Comptroller of the Currency and the passage by said board of directors of the said resolution.

Plaintiff denies that said R. L. Durham made any such report to said meeting of said stockholders and denies that he voted at any such meeting; and plaintiff denies that at said meeting it was unanimously voted or voted at all that the said report of the said R. L. Durham should be received and placed on file among the official reports of the office of the defendant and should be spread at length upon the minutes of the said shareholders' meeting; and this plaintiff denies that the shareholders at said meeting voted on said report or any report of the said R. L. Durham; and this plaintiff denies that he voted for any such report or any report of the said R. L. Durham at said meeting; and denies that he voted at all upon any subject at said meeting.

Plaintiff denies that he did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying the said assessment; an- denies that he did not question the legality regularity or necessity of said resolution on said assessment; and denies that he fully or completely acquiesced therein or acquiesced at all.

Denies that said board of directors in passing the said or any resolution which was passed on the 18th day of March, 1897, and in causing said sixty shares of stock to be sold as aforesaid
42 relied upon the silence of the plaintiff at said meeting of the stockholders of the defendant which was held on the 12th day of January, 1897, and denies that any resolution with reference to said assessment was presented or passed at said meeting; and de-

nies that said board of directors relied for any purpose upon the alleged silence of this plaintiff; and denies that this plaintiff acquiesced in or ratified said or any resolution passed by said board of directors on the 14th day of December, 1896, or any assessment therein or thereby levied; and denies that said board of directors relied upon any such acqui-s-ence or ratification.

Plaintiff denies that said board of directors would not have passed the said resolution which was passed on March 18th, 1897, as aforesaid, or that said sixty shares of stock would not have been sold by said board of directors or by the defendant to satisfy said assessment but for said silence of the plaintiff or his said acquiescence or ratification of said action of the board of directors in passing the said or any resolution on the 14th day of December, 1896, or in levying the said assessment; and this plaintiff denies that any resolution was passed on the 18th day of March, 1896, or that this plaintiff was silent with reference to said or any resolution or with reference to the levying of said assessment; and denies that said board of directors would not have sold said stock but for the said silence or any silence of plaintiff; and plaintiff denies that he was silent as to said assessment.

This plaintiff denies that he knew that said board of directors would rely upon his silence as to the passage of said resolution on the 18th day of March, 1897, or any time; and denies that
43 he was silent; denies that he acquiesced in said or any resolution; and denies that he ratified any resolution passed by said board of directors on said date; and denies that he knew that said board of directors would in reliance upon the silence, acquiescence or ratification of this plaintiff cause his sixty shares of the capital stock of the defendant to be sold to satisfy the assessment thereon; and denies that he was silent or that he acquiesced in or that he ratified anything which said board of directors did with reference to said assessment or the action of said board of directors at its meeting on the 12th day of January, 1897.

And plaintiff denies that plaintiff deliberately or intentionally or otherwise led the defendant to believe the defendant's acts to be lawful or proper or to act upon such belief as therein set forth or any belief, or that he deliberately or intentionally acted in all or any respects as herein set forth in order to lead defendant to rely thereon or to act as in said answer set forth.

Denies that he ought not to be admitted to allege that each and every act of the defendant herein set forth was not lawful or proper; and denies that he ever said or did anything to induce or lead said defendant to believe that its acts were lawful or proper in making said assessment or in selling plaintiff's stock.

And for reply to defendant's third further and separate answer, herein,

Denies that on the 12th day of January, 1897, at a regular annual meeting of the stockholders of the defendant, at which the plaintiff was present and voted, one R. L. Durham, who was then the
44 vice president and managing officer of the defendant, submitted to the shareholders of the defendant for action by

them thereon a report containing a full and complete statement of the facts in said answer before alleged, to-wit:—the receipt by the defendant of the said notice from the Comptroller of the Currency and the passage by said board of directors of the said resolution.

Plaintiff denies that said R. L. Durham made any such report to said meeting of said stockholders and denies that he voted at any such meeting; and plaintiff denies that at said meeting it was unanimously voted or voted at all that the said report of the said R. L. Durham should be received and placed on file among the official reports of the officers of the defendant and should be spread at length upon the minutes of the said stockholders' meeting; and this plaintiff denies that the shareholders at said meeting voted on said report or any report of the said R. L. Durham; and this plaintiff denies that he voted for any such report or any report of the said R. L. Durham at said meeting; and denies that he voted at all upon any subject at said meeting.

Plaintiff denies that he did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying the said assessment; and denies that he did not question the legality, regularity or necessity of said resolution on said assessment; and denies that he fully or completely acquiesced therein or acquiesced at all.

45 Denies that said board of directors in passing the said or any resolution which was passed on the 8th day of March, 1897, and in causing said sixty shares of stock to be sold as aforesaid relied upon the silence of plaintiff at said meeting of the stockholders of the defendant which was held on the 12th day of January, 1897, and denies that any resolution with reference to said assessment was presented or passed at said meeting; and denies that said board of directors relied for any purpose upon the alleged silence of this plaintiff; and denies that this plaintiff acquiesced in or ratified said or any resolution passed by said board of directors on the 14th day of December 1896; or any assessment therein or thereby levied; and denies that said board of directors relied upon any such acquiescence or ratification.

Plaintiff denies that said board of directors would not have passed the said resolution which was passed on March 18th, 1897, as aforesaid, or that said sixty shares of stock would not have been sold by said board of directors or by the defendant to satisfy said assessment, but for said silence of the plaintiff or his said acquiescence or ratification of said action of the board of directors in passing the said or any resolution on the 14th day of December, 1896, or in levying the said assessment; and this plaintiff denies that any resolution was passed on the 18th day of March, 1896, or that this plaintiff was silent with reference to said or any resolution or with reference to the levying of said assessment; and denies that said board of directors would not have sold said stock but for the said silence

46 or any silence of plaintiff; and plaintiff denies that he was silent as to said assessment.

This plaintiff denies that he knew that said board of directors would rely upon his silence as to the passage of said resolution on the 18th day of March 1897, or any time; and denies that he was silent; denies that he acquiesced in said or any resolution; and denies that he ratified any resolution passed by said board of directors on said date; and denies that he knew that said board of directors would, in reliance upon the silence, acquiescence or ratification of this plaintiff cause his sixty shares of the capital stock of the defendant to be sold to satisfy the assessment thereon; and denies that he was silent or that he acquiesced in or that he ratified anything which said board of directors did with refeeence to said assessment or the action of said board of directors at its meeting on the 12th day of January, 1897.

And plaintiff denies that plaintiff deliberately or intentionally or otherwise led the defendant to believe the defendant's acts to be lawful or proper or to act upon such belief as therein set forth or any belief or that he deliberately or intentionally acted in all or any respects as herein set forth in order to lead defendant to rely thereon or to act as in said answer set forth.

Denies that he ought not to be admitted to allege that each and every act of the defendant herein set forth, was not lawful or proper; and denies that he ever said or did any thing to induce or lead said defendant to believe that its acts were lawful or proper in making said assessment or in selling plaintiff's stock.

47 That as to whether or not said board of directors caused notice of its alleged resolution to go into voluntary liquidation to be published for a period of two months or as provided by law or at all, this plaintiff has not sufficient knowledge or information thereof to form a belief; but this plaintiff denies that he had any information or knowledge as to the liquidation of said bank until after the same was accomplished.

This plaintiff denies that said board of directors believe or had reason to believe that all the claims against the defendant had been paid in full and as to the alleged distribution of the proceeds of said sale to Wells Fargo & Co. or any sales, this plaintiff has not sufficient knowledge or information thereof to form a belief.

And plaintiff denies that he had full or any notice of the sale of assets of defendant or of the distribution of the proceeds of any such sale, or that the board of directors were about to or would distribute the proceeds of said or any sale; and this defendant denies that he had any knowledge or information sufficient to form a belief as to any of the alleged proceedings of the defendant in liquidation of said bank or as to the proceeds of said bank with reference to its assets after said liquidation.

Plaintiff for a further reply to defendant's second and third separate answers alleges: as follows:—

That soon after Wells Fargo & Co. had acquired a majority of the stock in said bank, Mr. John J. Valentine, then president of Wells Fargo & Co. and who had become president of the bank, at a meet-

ing of the directors brought up the subject of assessing the
48 stock of the bank, at which time this plaintiff was present and strenuously objected to any assessment and argued with Mr. Valentine that it was inexpedient and unnecessary.

At this plaintiff avers that at all times and upon all occasions whenever the subject of assessing the stock of said bank was discussed among the directors this plaintiff objected to and protested against such assessment, all of which was well known to the officials of said bank; and this plaintiff believes and has reason to believe that he was removed from the directory of said bank by the votes of the stock held or controlled by Wells Fargo & Co. on account of his opposition to any assessment of the stock and at the alleged meeting of the stockholders on January 12, 1897, the directors of the bank well knew that this plaintiff had opposed to the best of his ability any assessment upon the stock of the bank.

And plaintiff further alleges that in the month of November, 1896, he went in person before the Comptroller of the Currency and protested and remonstrated against any assessment upon the stock of the bank and tried to show to said comptroller that such assessment was inexpedient, unnecessary and unjust; and on the 25th day of November, 1896, plaintiff addressed to the Comptroller of the Currency a letter upon the subject, of which the following is a copy, to wit:

Hon. James N. Eckles, Comptroller of the Currency, Washington, D. C.

49 DEAR SIR: I beg the privilege of addressing you once more with reference to the proposed assessment upon the stock of the Commercial National Bank of Portland.

The following are the names of the present directors of the bank: John J. Valentine, Homer S. King, R. M. Dooley, Eugene Shelby, A. Koehler, W. M. Jack, John McCraken, H. C. Wortman, and R. L. Durham.

Mr. Valentine is the president of the Wells-Fargo Express Co. Mr. King is the cashier of Wells Fargo & Co.'s bank in San Francisco. Mr. Dooley is an assistant put in the Portland bank by Wells-Fargo & Co. after said company became interested in the bank and nominally holds ten shares to qualify him to act as director. Mr. Shelby is the agent of Wells Fargo & Co. in Portland and nominally holds ten shares to enable him to act as director. Mr. Koehler is the manager of a railroad here and nominally holds ten shares to qualify him to act as director.

These shares have been transferred to these persons, as I understand, by Wells-Fargo & Co. and the stock in their names practically belongs to Wells Fargo & Co.

Mr. Jack was at one time decidedly opposed to the assessment but for reason- best known to himself seems to have changed his views. Col. John McCraken is opposed to the assessment and, though he voted for the resolution, I am informed that he has caused a protest to be entered on the records to the effect that he does not consider it

necessary or advisable. Mr. Wortman, who is one of our leading merchants, is opposed to the assessment and refused to attend the meetings where he understood the resolution was to be passed,
50 and he is most emphatic in his disapproval of the assessment.

You know the position of Mr. Durham. He is vice-president of the bank and acted as president at the meeting but did not vote.

I herewith enclose a list of the stockholders of the bank, and though I have not had an opportunity to confer with all of them, I have interviewed several of them and according to the best information I can get, all of the stockholders except those who are interested with Wells-Fargo & Co. (with the exception of Mr. Jack) are opposed to the assessment. Most of them are unable at this time to raise the money necessary to pay an assessment of 50% on their stock and the result will be that their stock will be sold to pay for the assessments and will probably be purchased by Wells-Fargo & Co. or some body for them at nominal prices.

I do not know of course, what the object of Wells-Fargo & Co. is in pressing this assessment, but I know that most of the stockholders feel it is an attempt on the part of that corporation to obtain their stock for nominal prices. I do not say that this is so, but I say it is so regarded by a great many of the stockholders.

I am satisfied that there is no necessity for this assessment? The bank is doing a very good and improving business and although there are some debts outstanding due the bank which are doubtful, yet the probabilities are that a great many of them will be paid if some indulgence is shown to the debtors.

I know of no reason why an assessment should be made upon the stock of a national bank where the bank *in* in prosper-
51 ous circumstances, simply because during the late hard times it has suffered some losses; and I do not believe there is any more reason for assessing the stock of the Commercial national bank than there is for assessing the stock of every other national bank in the country, and I do not believe that there is one of them that has not suffered a great or less loss during the late financial depression of the country and as far as I am advised the losses of the Commercial national bank are not as great as the losses of some other national banks in this State, on the stock of which nobody desires an assessment.

I hope you will refuse to make the assessment if you can possibly do so consistently with your duty as a public officer, as I know that an assessment would practically confiscate a large part of the stock of this bank belonging to a minority of the stockholders.

Very truly yours, GEO. H. WILLIAMS.

Enclosure 1.

And of the plaintiff's interview with the comptroller as aforesaid and of the writing of the aforesaid letter to the comptroller the officials of said bank at the time had full notice.

Plaintiff further alleges that after notice of the intended sale of

said stock had been published Mr. George H. Durham, an attorney of this court, and a stockholder in said bank, after a conference with this plaintiff notified the officials of said bank that we regarded the assessment of said bank as illegal and that if the stock was sold to pay said assessment the bank would be called to account for
52 the same or words to that effect.

Plaintiff denies that by reason of the premises, or for any reason, he is estopped from now presenting any claim against the defendant.

Wherefore, plaintiff prays judgment as in his complaint.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } ss:

I, George H. Williams, being first duly sworn, say that I am the above named plaintiff and that the foregoing answer is true as I verily believe.

GEO. H. WILLIAMS.

Subscribed and sworn to before me this 31st day of July, 1899.

THOS. O'DAY,
Notary Public for Oregon.

STATE OF OREGON, }
County of Multnomah, } ss:

Due and legal service of the within reply is hereby accepted in Multnomah county, Oregon, this 31 day of July, 1899, by receiving a copy thereof, duly certified to as such by Thos. O'Day attorney for plaintiff.

PLATT & PLATT,
Attorneys for Defendant.

53 And afterwards, on the 5th day of August, 1899, there was filed in the office of said clerk, a

Motion to Strike out Parts of Reply

in words and figures as follows, to-wit: —

(Title.)

Comes now the defendant above named, appearing by Platt & Platt, its attorneys, and moves to strike out from plaintiff's further reply to defendant's second and third separate answers as follows, to-wit: —

1st. All that portion thereof contained between lines three and ten (3 & 10) both inclusive, of page eight (8) thereof, on the ground and for the reason that the same is incompetent, immaterial, irrelevant, sham and frivolous;

2nd. All that portion thereof contained between lines eleven to

twenty-two (11 to 22), both inclusive of page eight (8) thereof, on the ground and for the reason that the same is incompetent, immaterial, irrelevant, sham and frivolous;

3rd. All that portion thereof contained between line twenty-three (23) page eight (8) and line four (4) page eleven (11) on the ground and for the reason that the same is incompetent, immaterial, irrelevant, sham and frivolous;

4th. All that portion thereof contained between lines five and eleven (5 & 11) both inclusive, of page eleven (11) thereof, on the ground and for the reason that the same is incompetent, immaterial, irrelevant, sham and frivolous.

54 PLATT & PLATT,
Attorneys for Defendant.

E. S. PILLSBURY, *Of Counsel.*

STATE OF OREGON, }
County of Multnomah, } ss:

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 5th day of August, 1899, by receiving a copy thereof duly certified to as such by Robert Treat Platt one of attorneys for defendant.

THOS. O'DAY,
Of Attorneys for Plaintiff.

And afterwards, on Friday, the 13th day of October, 1899, the same being the 29th judicial day of the September term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time, the court being fully advised on the motion to strike out parts of reply herein heretofore argued and submitted;

It is therefore ordered and adjudged that the motion be and the same is hereby denied.

(Signed) ALFRED F. SEARS, JR., *Judge.*

55 And afterwards, on the 5th day of February, 1900, there was filed in the office of said clerk, a

Stipulation

in words and figures as follows, to-wit :—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

GEORGE H. DURHAM, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

CLEVELAND ROCKWELL, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

56 In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

H. C. LEONARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

ELLA C. DURHAM, Administratrix of the Estate of S. A. Durham, Deceased, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

PERRY HINKLE, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiffs above named, all acting by their attorneys of record, O'Day & Tarpley, except plaintiff H. C. Leonard who acts by Nixon & Dolph, his attorneys of record, and the defendant in all of said actions appearing by E. S. Pillsbury and Platt & Platt, its attorneys of
57 record; that the case of George H. Williams *versus* Commercial National Bank of Portland, now pending and at issue in department two of said court, and the case of Henry Weinhard *versus* Commercial National Bank of Portland, now pending and at issue in department one of said court shall be set for trial in their respective departments upon the same day and when so set they shall be tried at the same time by and before the presiding judges in the said departments sitting for said purpose in either of the court rooms of said departments as may suit the convenience of said judges with the same force and effect as though the said trials were conducted separately by and before said judges in their respective departments and the said causes shall be tried without the intervention of a jury or juries and the same are hereby expressly waived by all the parties hereto. All of the evidence produced or received on the said trial shall be considered as offered in each of said causes and shall apply to and govern each of the said judges in arriving at their findings of fact and conclusions of law therein and judgment thereon and thereafter which said findings of fact and conclusions of law and judgment based thereon shall be made and rendered in the respective departments wherein said causes are pending except that such evidence as the defendant may offer in the said cause of George H. Williams *versus* Commercial National Bank of Portland, to sustain the second and third separate answers and defenses contained within its answer and such evidence as said plaintiff may offer in relation thereto, shall not be considered by the presiding judge of said department one as no such issue- as are raised by said

second and third separate answers of defendant are presented
58 in the case of Henry Weinhard *versus* Commercial National Bank of Portland;

It is further stipulated and agreed that in the remainder of said cause recited in the caption hereto, to-wit, George H. Durham *vs.* Commercial National Bank of Portland, Cleveland Rockwell *vs.* Commercial National Bank of Portland, H. C. Leonard *vs.* Commercial National Bank of Portland, all pending in department one of said court, and Ella C. Durham, as administratrix of the estate of S. A. Durham deceased, *vs.* Commercial National Bank of Portland, and Perry Hinkle *vs.* Commercial National Bank of Portland, both pending in department two of said court, no further action shall be taken by any of the parties thereto until after final judgment in the court of last resort to which said case of Henry Weinhard *vs.* Commercial National Bank of Portland may be taken or judgment of above entitled court based on such decision by said court of last resort and in as much as a Federal question is involved in such cases, said court of last resort shall be interpreted to mean the Supreme Court of the United States, provided, however, that if either party shall fail to prosecute an appeal or writ of error in time from any decision that may be rendered in said cause, such failure so to appeal or sue out writ of error shall for the purposes of permitting action in those causes covered by this branch of this stipulation be equivalent to a decision or judgment by said United States Supreme Court in affirmance.

On such final decision by said Supreme Court of the United States or judgment herein in accordance therewith in said case of Henry Weinhard *versus* Commercial National Bank of Port-
59 land, judgment shall be rendered in each of the said causes covered by this branch of this stipulation in accordance with the legal import and effect of the decision in said Weinhard case wherein the issues are identical with said cases except as to the number of shares of the capital stock of the defendant involved, but in the event that such decision or judgment in said Weinhard case shall be for said plaintiff, said judgments shall as to this particular follow the allegations of the respective complaints as to the number of said shares.

Provided that if said Weinhard shall wilfully and contrary to the wishes of the other plaintiffs whose cases are stayed under the terms of this stipulation, refuse to appeal or sue out a writ of error from any decision adverse to him, then and in that case the decision in said Weinhard case shall not be conclusive on said plaintiffs but the decision of the court of last resort in the case of George H. Williams *versus* Commercial National Bank upon those issues in said Williams case are presented alike in all the cases recited in the caption hereof shall govern the cases stayed hereunder with like effect as though said Williams case had been originally named herein in the place and stead of said Weinhard case as the case the final decision in which the court of last resort was to be followed by the respective

departments of the above entitled court, after such decision by said court of last resort has been had.

Provided, that if both said Weinhard and said Williams shall both wilfully and contrary to the wishes of plaintiff, H. C. Leonard, whose case is stayed under the terms of this stipulation, re-
60 fuse to appeal or sue out a writ of error from any decision adverse to them, then and in that case the decision in said Weinhard and Williams cases shall not be conclusive on said plaintiff H. C. Leonard, but any time within sixty days after the time to appeal or sue out a writ of error in said Weinhard and Williams cases shall have elapsed pursuant to said wilful abandonment by said Weinhard and Williams, plaintiff H. C. Leonard may cause a judgment to be entered in his case in department one of the above entitled court in accordance with the original decision and judgment in the Weinhard case in said above entitled court and thereafter said case shall proceed in its regular course. Failure to so act within sixty days shall be construed as an adoption of the decision in the Weinhard case from which no appeal or writ of error has been taken and authorize defendant to enter judgment against plaintiff H. C. Leonard so failing to act in department one of the above entitled court in accordance with said Weinhard decision so adopted. The prosecution of either the Weinhard or Williams cases to the court of last resort shall, however, bind plaintiff Leonard as well as the other plaintiffs as hereinbefore provided.

In case of disagreement on the part of said judges as to the admissibility of any testimony offered, the record shall show — which of said causes said testimony is received and in which rejected and the grounds of objection.

This stipulation shall be filed in said case of George H. Williams *versus* Commercial National Bank of Portland and considered as filed in each of the other cases recited in the caption hereof.

61 O'DAY & TARPLEY,
Attorneys for all Plaintiffs Excepting H. C. Leonard.
NIXON & DOLPH,
Attorneys for Plaintiff H. C. Leonard.
E. S. PILLSBURY,
PLATT & PLATT,
Attorneys for Defendant.

And afterwards, on Tuesday the 20th day of February, 1900, the same being the 38th judicial day of January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time this cause comes on regularly for trial before the court, the parties hereto having stipulated that said cause be tried

without the intervention of a jury, plaintiff appearing in person and by O'Day & Tarpley, his attorneys and the defendant by Platt & Platt and E. S. Pillsbury its attorneys,

62 The court, after hearing the allegations of parties and part of the testimony of witnesses and the time for adjournment having arrived the further hearing of this cause is continued until to-morrow morning at 9:30 o'clock.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Wednesday, the 21st day of February 1900, the same being the 39th judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

At this time come the same parties and counsel as of yesterday and the trial of this cause is against proceeded with After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders and this cause is hereby continued until Friday morning at 9:30 o'clock.

(Signed) ALFRED F. SEARS, JR., *Judge.*

63 And afterwards, on Friday, the 23rd day of February 1900, the same being the 40th judicial day of the January term of said court. there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

At this time come the same parties and counsel as of Wednesday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders, and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Saturday the 24th day of February 1900, the same being the 41st judicial day of January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time come the same parties and counsel as *as*
64 of yesterday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court order and this cause is hereby continued until Monday morning at 9:30 o'clock.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Monday the 26th day of February, 1900, the same being the 42nd judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to wit:—

(Title.)

At this time come the same parties and counsel as of Saturday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ALFRED F. SEARS, JR., *Judge.*

65 And afterwards, on Tuesday the 27th day of February 1900, the same being the 43rd judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

At this time come the same parties and counsel as of yesterday and the trial of this cause is again proceeded with; after hearing further testimony of witnesses and the hour of adjournment having been reached the court orders and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Wednesday the 28th day of February, 1900, the same being the 44th judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

At this time come the parties and counsel as of yesterday
66 and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and part of the arguments of counsel and the hour of adjournment having been reached the court orders, and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Thursday the 1st day of March, 1900, the same being the 45th judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

At this time comes the same parties and counsel as of yesterday and the trial of this cause is again proceeded with. The court after hearing the further arguments of counsel and not being fully advised in the premises takes the same under advisement.

(Signed) ALFRED F. SEARS, JR., *Judge.*

67 And afterwards, on the 24th day of October, 1900, there was filed in the office of said clerk, a

Motion for Rehearing

in words and figures as follows to-wit:—

(Title.)

Comes now the above named defendant and moves the court for a rehearing in this cause on that part of the findings of the court, wherein the stock held by the plaintiff in defendant corporation was found to be of the value of twenty dollars per share on the fifth day of May, 1897, and the good will thereof was found to be of the value of ten dollars per share on the fifth day of May, 1897, on the ground and for the reason that the evidence submitted in this cause was insufficient to sustain such findings.

PLATT & PLATT,
Attorneys for Defendant.
E. S. PILLSBURY, *Of Counsel.*

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 23rd day of October, 1900, by receiving a copy thereof duly certified to as such by Robert T. Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

68 And afterwards, on the 2nd day of November, 1900, there was filed in the office of said clerk, a

Motion

in words and figures as follows, to-wit:—

(Title.)

Comes now the defendant above named appearing by E. S. Pillsbury and Platt & Platt, its attorneys, and moves and requests the court that in making its findings of fact herein it find separately upon the value of the stock of the defendant on the fifth day of May, 1897, if any it had, and upon the value of the good will of the shares of stock of the defendant on said date if any they had.

E. S. PILLSBURY,
PLATT & PLATT,
Attorneys for Defendant, Commercial National Bank of Portland.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 1st day of November, 1900, by receiving a copy thereof duly certified to as such by Robert T. Platt one of the attorneys for defendant Commercial National Bank of Portland.

O'DAY,
Attorneys for Plaintiff.

69 And afterwards, on Monday the 12th day of November, 1900, the same being the 6th judicial day of the November term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time, by consent of the respective parties the motion to separately state the value of stock in the findings of fact comes on for hearing.

The court after hearing the arguments of counsel and not being fully advised in the premises takes the same under advisement.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Saturday, the 1st day of December, 1900, the same being the 18th judicial day of the November term of court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time, the court being fully advised on the motion for special findings of fact heretofore argued and submitted, it is therefore ordered that the said motion be and the same is hereby denied.

69½ ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Thursday the 6th day of December 1900, the same being the 21st judicial day of the November term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time on motion of counsel, it is ordered that the defendant be and it is hereby given until January 15th, 1901, in which to prepare and file bill of exceptions.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on the 6th day of December, 1900, there *was* filed in the office of said clerk,

Findings

in words and figures as follows, to-wit:—

(Title.)

This cause having duly come on for hearing before the court without the intervention of a jury, the parties hereto by their stipulation in writing filed herein, having expressly waived a jury in this cause, and the court having heard the testimony and ar-
70 gument of counsel herein, and being fully advised in the premises, hereby makes and files the following findings of fact and conclusions of law.

Findings of Fact.

I. That on the 5th day of May, 1897, the plaintiff herein was the owner and holder of 60 shares of the capital stock of the defendant bank, of the par value of $6,000. as alleged in the complaint herein.

II. That on said date the defendant bank wrongfully converted the same to its own use and benefit, as alleged in the complaint, and thereby deprived said plaintiff of said stock and the whole thereof, and that said stock on said date was of the actual value of $30.00 per share, being of the total value of $1800.00.

III. That no evidence was offered to support the second and third separate answers of the defendant alleging an estoppel, and the plaintiff is not estopped from asserting his claims as set forth in the complaint herein.

Conclusions of Law.

That said plaintiff is entitled to judgment against said defendant Commercial National Bank of Portland for said sum of eighteen hundred dollars and for his costs and disbursements herein.

ALFRED F. SEARS, JR., *Judge.*

71 And afterwards, on Friday, the 7th day of December, 1900, the same being the 22nd judicial day of the November term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now on this day, this cause coming on to be heard and the court having heretofore made and filed findings of fact and conclusions of law in this action, to which reference is hereby made,

It is therefore considered by the court that said plaintiff have and recover of and from saod defendant The Commercial National Bank of Portland, Oregon, the sum of eighteen hundred dollars and his costs and disbursements herein taxed at $69.85, and that he have execution therefor.

(Signed) ALFRED F. SEARS, JR., *Judge.*

And afterwards, on Thursday, the 6th day of December 1900, the same being the 21st judicial day of the November term of said court, there was rendered and entered the following

Order

72 in words and figures as follows, to-wit:—

(Title.)

Be it remembered, that upon the trial of the above entitled cause before the court, the parties hereto having waived a jury, before any findings were signed by the court, the plaintiff filed his motion asking the court for an additional finding to the effect that plaintiff was entitled to interest upon the value of his stock wrongfully converted by defendant from the date of such conversion but the court refused to make such finding and decided that the plaintiff was not entitled to any interest, to which refusal and decision the plaintiff at the time duly excepted and his exceptions were allowed and the same are hereby signed and made part of the record in this cause.

6th December, 1900.

ALFRED F. SEARS, JR., *Judge.*

73 And afterwards, on the 30th day of April, 1901, there was filed in the office of said clerk, a

Bill of Exceptions

which is in words and figures as follows to-wit:—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

Be it remembered, that this cause came on regularly for trial before the court upon the — day of —— 1900, the parties hereto having waived a jury, and consented to the trial of the same without a jury, the plaintiff appearing in person and by Thomas O'Day, Esq., his attorney, and the defendant appearing by E. S. Pillsbury and Platt & Platt, its attorneys, and thereupon the following proceedings were had, to-wit:

Counsel for plaintiff made a statement as follows:—

"We stand on the pleadings and offer no evidence."

Thereupon the defendant moved the court for a non-suit on the following ground-:—

"1st. That the plaintiffs have introduced no testimony to sustain the affirmative allegations of their complaint; that a distinct
74 issue is tendered as to the value of the property claimed to have been converted and that allegation of value is denied

by the allegations of the answer, and thus an issue is tendered and the plaintiffs not having introduced any testimony to support the affirmative of that issue, they have not made out such a case as would throw the burden of proof on the defendant.

2nd. That in the allegations of the answer the sale and all proceedings in connection therewith are regular under the provisions of the national bank act, and the property was lawfully and properly sold by the defendant and no conversion took place. We refer to the section of the national bank act which relates to the sale, sec. 5203, Revised Statutes of the United States, and base our motion for non-suit as to that clause upon that section of the statute; and also upon the following sections of the Revised Statutes:

Sec. 5145, sec. 5136, also the following sections:—

5147	5137	5170	5142
5149	5162	5164	5166
5167	5171	5182	5183
5190	5191	5195	5196
5197	5201	5102	5103
5104	5206	5214	5222

also Revised Statutes 5142, as amended by section 1 of an act approved May 1, 1896. That will be found in the supplement of the Revised Statutes; also section 3 of an act approved June 30th, 1876, and an act approved July 12th, 1882;

75 Also section 1 of an act approved May 1, 1886, giving the shareholders right to vote on increase of capital stock; also section 2 of the same act; and section 3 of an act approved June 30th, 1876, as amended by an act of August 3rd, 1892; all of these references being made to the statutes of the United States in reference to national banks. I will refer for general reference to the statute as a whole with the substituted amendments."

Counsel for plaintiff thereupon stated as follows:—

"We are willing to risk our position on the proposition that the plaintiff did own at the time of his sale sixty shares of the paid-up capital stock."

The court denied the motion for a nonsuit and to this ruling of the court, the defendant at the time excepted, which exception was by the court allowed.

Thereupon the cause was submitted to the court upon the testimony and the arguments of counsel, and the court subsequently and on the 2nd day of October, 1900, delivered its opinion in writing, signed by the judge, and the same was filed in said court with the papers in this cause and is as follows:

"GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK, Defendant.

Opinion of Court.

This action is brought by plaintiff, a stockholder of the defendant, a national bank, to recover for an alleged conversion of stock
76 in said bank. He claims that he was the owner of 60 shares of stock of the par value of $6,000.00; that upon October 5th, 1896, the board of directors adopted resolutions requesting the Comptroller of the Currency to call for an assessment of 50% upon the capital stock of the bank in accordance with a provision of the U. S. statutes, under a claim that the capital stock had been impaired; that the comptroller on Dec. 5th gave notice of impairment to an extent which made necessary an assessment of $250,000.00 or 50% assessment on the face value of the said stock; that thereafter the board of directors passed a resolution levying the assessment contemplated.

It is furthermore averred that the action of said board and comptroller was without any authorization of the stockholders; and herein it is claimed was the illegality of the action of such board of directors and of the defendant.

Thereafter it is claimed and conceded by defendant a sale *in invitum* was made of plaintiff's said stock for non-payment of the assessment;

The plaintiff asserting its value at such time to have been $6,000.00 asks for a judgment in such sum together with interest from May 5, 1897, the date of the sale.

It is obvious that the subject matter of inquiry arising upon this complaint is as to whether the board of directors may act as was done here without the approval or indeed any action upon the part of the stockholders sustaining such act.

This question was presented by the court by demurrer and decided adversely to defendant's contention.

Thereafter defendant answered and the cause was tried
77 before two judges of the court without the intervention of a jury.

After the determination of the legal questions referred to, the sole matter for the consideration of the court was the amount of value of the plaintiff's shares of stock at the time of the sale aforesaid, the plaintiff claiming that it was worth at least 50% of its face value at such time, aside from the good will, the worth of which should be added thereto; the defendant upon the other hand denying that it possessed any value whatever; and to the elucidation of this question much testimony was taken and voluminous briefs have been presented by the respective counsel.

The court has been but little hampered by questions of law, though incidentally to the main issue many cases have been cited,

and while agreeing upon some of the main questions involved, the arguments of counsel have taken a wide range as to the method of arriving at this value of the stock.

The opinion of the court is that the value of the shares of stock at the time of a conversion presents the true rule in a case of this nature. How shall this value be reached? No method has been found satisfactory except by a careful examination of the testimony adduced upon each side, computing the worth of the holdings of the bank, etc. and while mathematical accuracy has proved unat-ainable, an endeavor has been made to approach a fair and just valuation by a proper estimate of the worth of such assets as the testimony has reached.

We have been unable to concur with the position of the plaintiff that under any view this stock is shown to have been worth
78 50% on its face value under the circumstances of the sale. We find no elements of estoppel resulting therefrom, nor do the cases cited by counsel to our minds sustain their contention; at least the weight of authority is upon the other side.

Nor does it appear conclusive that $3000.00 would be the plaintiff's share of the assets sold to Wells Fargo & Co., for $250,000.00 nor that this sale should furnish a final, if any, test of value.

A somewhat acrimonious discussion too, took place as to the *animus* of Wells Fargo & Co.'s conduct and a claim has been asserted that in some way damages should be enhanced through some application of the rules relating to punitive damages; but this view has not met with an hospitable reception at the hands of the court.

Not being founded in the opinion of the court upon any correct legal principle its consideration has been rejected.

On the other hand we are unable to su-scribe to the views of the defendant's counsel that this stock was valueless nor even that the good will was without value.

It would serve no good purpose to review the large amount of evidence submitted. We are clear from the weight of the evidence as to certain tangible assets that these shares of stock had a value. The witnesses for the defendant have wholly underrated these assets though a correspondingly false enhancement thereof has been made by the other side. Nothing is more difficult than for minds differently constituted to agree upon matters of this kind nor is it an essential impeachment of the honesty or good intentions of witnesses that these differences should exist; they largely result
79 from inherent intellectual idiosyncracies. We are of the opinion that the good will of this bank, if properly nursed and protected, had a value.

To announce finally and in short our views without attempting to discuss more fully the evidence, we place the value of the shares of plaintiff's stock at the time of the sale thereof by defendant at the sum of twenty dollars per share without the good will.

If these shares had a value, it must, we think, be obvious that the good will of the bank was of some worth even though at the moment the business was conducted without profit.

This bank had an established business; the patronage of valued customers, the result of years of work in the community.

This says Judge Story is the "benefit acquired by an establishment beyond the mere value of the capital, stocks, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Story Part'p sec. 39. 33 Cal. 624.

We have placed this value at ten dollars per share. These results are necessarily somewhat arbitrary. In the nature of the case such conclusion may not be avoided. But it is a careful and pain-taking consummation of a task which has taxed our energies to the fill, and in our view, the nearest approach to accuracy attainable
80 in the light in which the questions involved have been presented.

This action sounding in tort we find no basis in the claim for interest as this matter is treated under the Oregon statute, and such claim will be disallowed, before at least the decision of the case.

Let findings be prepared in conformity with the views hereinbefore expressed.

SEARS, *J.*

The foregoing is concurred in by Judge Frazier.

Endorced: Circuit court Multnomah county Oregon. Geo. H. Williams *v.* Commercial Nat. Bank. Opinion of court. Filed Oct. 2nd, 1900, J. P. Kennedy clerk, by Lansing Stout deputy.

Thereupon before any other or further findings of fact or conclusions of law were signed by the court the defendant filed its written motion asking the court that in making its formal findings of fact, it find separately upon the value of the stock of the defendant on the 5th day of May, 1897, if any it had, and upon the value of the good will of the shares of stock on said date, if any they had; the court having by its said decision in writing herein found that the intrinsic and appraised value of the assets represented by said shares and therefore of said shares was twenty dollars per share, and the court having further found that it followed that as said shares were intrinsically of such value, the good will thereof also had a value placed at the additional sum of ten dollars per share, or a total of thirty dollars per share, which said motion to separately find was by the court denied, to which refusal and denial the defendant duly excepted and its exception was allowed.

81 Wherefore the defendant presents this, its bill of exceptions, which having been examined by the court and made to conform to the facts and allowed, is now signed and made a part of the record in this cause, this 30th day of April, 1901, as and of January 15th, the actual date of presentation of this bill of exceptions.

ALFRED F. SEARS, JR., *Judge.*

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within bill of exceptions is hereby accepted in Multnomah county, Oregon, this 15th day of January, 1901, by receiving a copy thereof duly certified to as such by Harrison G. Platt one of attorneys for defendant.

THOS. O'DAY,
Of Attorneys for Plaintiff.

And afterwards, on the 3rd day of June, 1901, there was filed in the office of said clerk, a

Notice of Appeal

in words and figures as follows to-wit:--

82 In the Circuit Court of the State of Oregon for Multnomah County.

GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, a Corporation, Defendant.

To George H. Williams, plaintiff, and to O'Day and Tarpley, his attorneys:

You and each of you will please hereby take notice that the defendant, Commercial National Bank of Portland, appeals to the supreme court of the State of Oregon from the judgment given and entered in the above entitled cause on the 7th day of December, 1900, by the circuit court of the State of Oregon for Multnomah county,

PLATT & PLATT,
Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within notice is hereby accepted in Multnomah county, Oregon, this 3rd day of June 1901 by receiving a copy thereof duly certified to as such by Harrison G. Platt one of attorneys for defendant.

THO-AS O'DAY,
Attorneys for Plaintiff.

83 And afterwards, on the 5th day of June, 1901, there was filed in the office of said clerk, an

Undertaking on Appeal

in words and figures as follows, to-wit:—

In the Circuit Court of the State of Oregon for Multnomah County.

GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, a Corporation, Defendant.

Whereas, the defendant in the above entitled cause appeals to the supreme court of the State of Oregon from the judgment made and entered in the above entitled cause on the 7th day of December, 1900, by the above entitled court;—

Now therefore, in consideration of the premises and of such appeal, we, the undersigned defendant as principal and R. Lea Barnes as surety, do hereby jointly and severally undertake and promise on the part of appellant that the said appellant will pay all damages, costs and disbursements that may be awarded against it on the appeal.

COMMERCIAL NATIONAL BANK
OF PORTLAND,
By PLATT & PLATT, *Its Attorneys.*
R. LEA BARNES.

84 STATE OF OREGON, }
County of Multnomah, } *ss:*

I, R. Lea Barnes, whose name is subscribed to the within undertaking as surety, being duly sworn, say that I am a resident and householder within the State of Oregon, and am not a counselor or attorney at law, sheriff, clerk or other officer of any court, and am worth the sum of five hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

R. LEA BARNES.

Subscribed and sworn to before me this 4th day of June, 1901.
[SEAL.]
HARRISON G. PLATT,
Notary Public for Oregon.

STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within undertaking on appeal is hereby accepted in Multnomah county, Oregon, this 4th day of June, 1901, by receiving a copy thereof certified to as such by Harrison G. Platt, one of attorneys for defendant.

THOS. O'DAY,
Attorneys for Plaintiff.

85 And afterwards, on the 3rd day of July, 1901, there was filed in the office of said clerk, a

Stipulation

which is in words and figures as follows, to-wit:—

(Title.)

It is hereby stipulated and agreed by and between the parties to the above entitled cause, acting by their respective attorneys, that defendant and appellant may have to and including the first day of August, 1901, in which to file transcript on appeal in this cause in the supreme court of the State of Oregon, and it is further stipulated that an order pursuant hereto may be entered upon the motion of the defendant.

THOS. O'DAY,
Attorneys for Plaintiff.
PLATT & PLATT,
Attorneys for Defendant.

And afterwards, on Wednesday the 3rd day of July, 1901, the same being the 48th judicial day of the May term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

86 Now at this time, based upon the stipulation of parties,
It is ordered that defendant and appellant do have to and including the first day of August, 1901, in which to file transcript on appeal in this cause in the supreme court of the State of Oregon.
(Signed) ARTHUR L. FRAZER, *Judge.*

87 In the Circuit Court of the State of Oregon for the County of Multnomah.

STATE OF OREGON,
County of Multnomah, } *ss:*

I, J. P. Kennedy, clerk of the circuit court of the State of Oregon, for the county of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries and bill of exceptions constituting the judgment roll, together with the notice of and undertaking on appeal in the case of George H. Williams plaintiff and respondent, *vs.* Commercial National Bank of Portland, a corporation, defendant and appellant have been by me compared with the originals thereof, and that they are true and correct tran-

cripts of such original pleadings, papers, orders, journal entries and bill of exceptions and notice of and undertaking on appeal as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court the 25th day of July A. D. 1901.

[SEAL.] J. P. KENNEDY, *Clerk*,
By LANSING STOUT, *Deputy*.

88 In the Circuit Court of the State of Oregon for the County of Multnomah.

GEORGE H. WILLIAMS, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, a Corporation, Defendant and Appellant.

STATE OF OREGON,
County of Multnomah, } *ss:*

I, J. P. Kennedy, clerk of the circuit court of the State of Oregon, for the county of Multnomah, do hereby certify that on the 5th day of June 1901, Commercial National Bank of Portland a corporation the defendant and appellant in the above entitled cause, filed its undertaking on appeal, *in* with R. Lea Barnes as surety therein conditioned that the said appellant will pay all damages, costs and disbursements which may be awarded against it on appeal.

And I further certify that said undertaking is given for an appeal only.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court this 25th day of July A. D. 1901.

[SEAL.] J. P. KENNEDY, *Clerk*,
By LANSING STOUT, *Deputy*.

89 (Endorsed:) In the supreme court of the State of Oregon. Appeal from Multnomah county. George H. Williams, plaintiff and respondent, *vs.* Commercial National Bank of Portland, defendant and appellant. Transcript Filed August 1, 1901, J. J. Murphy, clerk. By J. W. Reeves, deputy.

90 HENRY WEINHARD, Respondent,
v.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Appellant.

GEORGE H. WILLIAMS, Respondent,
v.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Appellant.

Appeal from Multnomah county.

Hon. Alfred F. Sears, Jr., and Hon. Arthur Frazer, judges.

Thos. O'Day, Geo. H. Durham and Geo. H. Williams, for respondent.

H. G. Platt, for appellant.

Bean, C. J.

Affirmed.

91 Two separate actions were brought by Henry Weinhard and George H. Williams, respectively, to recover the value of certain shares of stock in the defendant corporation alleged to have been wrongfully converted by it. As the same questions are involved in each case, they are here considered together.

The defendant is a banking association, organized under the national bank act. On December 5, 1896, the Comptroller of Currency found that its capital stock had become impaired to an extent which made necessary an assessment of $250,000, and notified the association to pay the deficiency by assessments upon its shareholders *pro rata*, and, if not so paid and the bank should refuse to go into liquidation as provided by law for three months after the receipt of the notice, a receiver would be appointed to close up its business. Upon the receipt of the notice, the directors of the bank held a meeting and levied an assessment upon each shareholder of fifty per cent. or fifty dollars per share, payable on or before March 11, 1897. At the time of such assessment, Weinhard owned one hundred shares of the capital stock, fully paid up, of the par value of $10,000, and Williams, sixty shares, of the par value of $6,000, likewise fully paid up. They both refused or neglected to pay the assessment levied by the directors, and, on May 5, 1897, their stock was sold at public auction, in pursuance of a resolution of the board, and the bank received on such sale the amount of the assessment. Thereafter these actions were brought to recover the value of the stock sold by the corporation, alleging it to be worth par, on the ground that the assessment was invalid and without authority of law. The plaintiffs recovered judgment in the court below, and the bank appeals.

BEAN, *C. J.*:

Two questions are presented for our determination on this appeal: First, it is insisted that the court erred in overruling the defendant's motion for a nonsuit, and, second, in holding that under the
92 national bank act the authority to levy assessments upon the shareholders of a bank for the purpose of repairing its capital

stock is vested in the shareholders themselves, and not in the directors.

The plaintiffs offered no testimony, as part of their case in chief, tending to show the value of the stock alleged to have been converted by the defendant, and for this reason it is urged that the motion for a nonsuit was well taken. At the time of the sale the bank was a going concern, engaged in the transaction of the ordinary business of a banking association, and it may be presumed, we think, that its stock had some value, at least sufficient to entitle the plaintiff- to a nominal judgment, if their stock had been wrongfully converted. In addition to this it appears from the opinion of the trial court, which is set out in full and made a part of the bill of exceptions, that "much testimony was taken, and voluminous briefs have been presented by the respective counsel" upon the question as to the value of the stock, so it would seem that, if there was error in overruling the motion for a nonsuit, it was subsequently cured.

The other question involves a construction of the national bank act. It provides, in brief, that any number of natural persons, not less than five, may form an association for carrying on the business of banking by executing and filing with the Comptroller of the Currency articles of association and an organization certificate stating certain facts: U. S. Rev. St., §§ 5133, 5134, 5135. Such association thereupon becomes a body corporate, with power, among other things, to elect or appoint directors and, by such directors, to appoint a president, vice-president, cashier, and other officers, etc., to prescribe by-laws, regulating the manner in which its stock shall be transferred, its directors and officers elected or appointed, its general business conducted, and the privileges granted to it by law exercised and enjoyed, and to exercise all such incidental powers as shall be necessary to carry on the business of banking, etc.; *id.*, § 5136.

93 At least fifty per centum of the capital stock must be paid in before the bank can be authorized by the Comptroller of the Currency to commence business, and the remainder in monthly installments of at least ten per centum, which fact shall be certified to such officer under oath: *Id.*, §§ 5139, 5140. The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders: *Id.*, § 5145.

The shareholders are individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of the association to the extent of the amount of their stock therein, at its par value, in addition to the amount invested in such shares (*id.*, § 5151), and no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital: *Id.*, § 5204. Section 5205 reads as follows: "Every association which shall not have fully paid up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by

assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four."

The assessment and subsequent proceedings in this case were had under the provisions of the section quoted, and the question for our decision is whether, when the Comptroller of the Currency
94 finds that the capital stock of a national bank has been impaired by losses, or otherwise, and notifies the association to make up the deficiency by assessment on its shareholders or a receiver will be appointed, such assessment is to be made by the shareholders or directors of the association. In our opinion, the language of the section plainly implies that, upon receiving such notice, the association may elect to either continue in business by increasing the amount of the investment, or go into voluntary or involuntary liquidation, and, as this question affects the shareholders alone, they, and not the directors, are entitled to determine the course that shall be pursued. The individual liability of the shareholders in a national bank is fixed by statute at the par value of the stock held by each, in addition to the amount invested in such shares, (§ 5151), and does not arise except in case of liquidation and for the purpose of winding up the affairs of the institution. There is no legal obligation on their part to pay an additional assessment necessary to repair the capital stock, unless it is voluntarily authorized by them. Their only obligation, when notice is given by the Comptroller of the Currency of the impairment of the capital stock of the bank, is either to assess themselves and make up the deficiency, and thus increase their investment, or to go out of business, and we think, the law contemplates that this right shall be exercised by them alone. If they desire and elect to continue in business they must make up the deficiency, but they are, in our opinion, at liberty to take the other alternative and allow the corporation to go into liquidation. The question is a Federal one, and, so far as we are advised, has never been directly passed upon by the Supreme Court of the United States. In *Delano v. Butler*, 118 U. S. 634, the court was called upon to decide whether payments made upon assessments voluntarily levied by the shareholders, under U. S. Rev. St., § 5205, could be applied in the discharge of subsequent assessments made by the comptroller in final liquidation of the bank, under section 5151. It was held that they could
95 not. Mr. Justice Matthews' opinion proceeds on the theory that the assessment contemplated by section 5205 is one to be imposed on the shareholders by their own vote for the purpose of restoring their lost capital as a consideration for the privilege of con-

tinuing in business, while, under section 5151, the shareholders may be compelled to discharge their individual responsibility for contracts, debts and engagements of the association. He says: "The assessment as made under section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment of the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and in the ordinary course of business certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas under section 5151, the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably." These remarks are, of course, not authoritative, because they were not necessary to the decision of the case, but they are, nevertheless, very persuasive, and indicate the views of the learned justice, if not the entire court. In *Hulitt v. Bell*, 85 Fed. 98, the circuit court of the United States for the southern district of Ohio, in an able and well-reasoned opinion by Judge Sage, held that an assessment levied by a board of directors of a national bank to make up a deficiency in its capital stock, under sections 5205, was invalid and not within the power of the directors, but should have been made by the shareholders themselves. After referring to the duties and powers of the directors as provided in the bank act, he says: "The assessment in question does not fall within any of these powers. It does
96 not come under the head of incidental powers necessary to carry on the business, nor is it included in the conduct of general business. It is a provisions for a special emergency, so unusual and of such importance as to make it necessary for the association to consider and determine whether it will continue in business or wind up its affairs. The impairment of the capital may have resulted from inefficiency or incapacity or the fault or wrong of the directors under whose administration of the affairs of the bank it occur-ed. Their holdings of the capital stock may be but a small proportion of the entire amount. They ought not to exercise control over a matter so vital, unless the statute gives it to them in unmistakable terms." It is argued that the opinion of the court upon this point is entitled to but little weight because the case could have been, and was, decided upon another point. The validity of the assessment was directly involved in the case, argued by counsel and considered and passed upon by the court, and, if the opinion of Judge Sage is *dictum* at all, it should, as said by Mr. Justice Cassiday, in *Buchner v. Chicago, M. & N. W. R'y Co.*, 60 Wis. 264, "be regarded as 'judicial *dictum*,' in contradistinction to mere *obiter dictum*." It was not a mere argument or illustration of some collateral question, but was the opinion of the court upon a litigated point in the case, and is entitled to be considered and recognized as such.

The judgment of the court below will therefore be affirmed.

97 Be it remembered that at a regular term of the supreme court of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 3rd day of March 1902,

Present: Hon. Robert S. Bean, chief justice, Hon. Frank A. Moore, associate justice, Hon. Charles E. Wolverton, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Saturday the 3rd day of May 1902, the same being the 34th judicial day of said term:

GEORGE H. WILLIAMS, Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Appellant.
} Appeal from Multnomah County.

This cause having heretofore to-wit:—on the 23rd day of April 1902, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon and being now fully advised in the premises finds that there is not error as alleged. It is therefore considered, ordered and adjudged that the judgment in this cause in the court below rendered be and the same hereby is in all things affirmed.

And it appearing that the appellant filed an undertaking for the appeal with R. Lea Barnes as surety therein, it is further ordered and adjudged that the respondent recover of appellant and R. Lea Barnes its said surety, his costs and disbursements in this court upon the appeal allowed and taxed at $59.00, it is further ordered that the cause be remanded to the said court below and that a judgment be there entered and docketed in accordance herewith.

98 In the Supreme Court of the State of Oregon.

GEORGE H. WILLIAMS, Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Appellant.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said action certified to and filed with our said court as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the county of Multnomah from which the said appeal was taken, and is the record and transcript upon which said appeal was heard, and the judgment of our supreme court entered thereon on the 3rd day of May 1902.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the judgment of our said supreme court upon the said appeal entered on the said 3rd day of May 1902, and a full, true and correct copy of the opinion of the court filed on

said 3rd day of May 1902, and upon which said judgment was entered.

I further certify that the petition for a writ of error in said cause and the endorsement thereon; the bond thereon, its approval and endorsements thereon; the order allowing the writ of error; the citation and proof of service endorsed thereon, the assignment of errors, the writ of error, and allowance thereof, all which are attached to the above and foregoing, are the original petition, bond, order, citation, assignment of errors and writ lodged with and now in my office; and I do certify that the above and foregoing are such original papers so lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said court as the same appears of record and on file in my office.

99

I further certify that the cost of the foregoing return to the writ of error is $42.00 and that said amount was paid by Messrs. Platt & Platt for the plaintiff in error.

In witness whereof, I have hereunto set my hand and the seal of the supreme court of the State of Oregon, at my office in the city of Salem, in said State, this the 22nd day of July 1902.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 18,641. Oregon supreme court. Term No. 110. Commercial National Bank of Portland, plaintiff in error, *vs.* George H. Williams. Filed August 6th, 1902.

SUPREME COURT OF THE UNITED STATES

COMMERCIAL NATIONAL BANK OF PORTLAND,
Plaintiff in Error,
vs.
HENRY WEINHARD,
Defendant.
No. 109.

COMMERCIAL NATIONAL BANK OF PORTLAND,
Plaintiff in Error,
vs.
GEORGE H. WILLIAMS,
Defendant.
No. 110.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The above-entitled cases have come to this Court by writs of error to the Supreme Court of the State of Oregon. The same questions arise in both and by stipulation they are to be heard together upon one brief. The federal jurisdiction obtains by reason of the necessary construction of various sections of the Revised Statutes of the United States constituting the National Bank Act. These suits, along with several others of like nature, were begun in the circuit court of the State of Oregon for Multnomah County to recover the value of certain shares of the Commercial National Bank of Portland, the plaintiff in error, and alleged to have been irregularly sold for an assessment.

By stipulation in the State court the two actions at Bar were tried as test cases, the residue to abide the result.

These suits arose under the following circumstances: Some years prior to 1896 the Commercial National Bank of Portland was organized under the National Bank Act to do business in Portland, Oregon. During the latter year it became known to the Comptroller of the Currency through reports of the bank officials and of the National Bank Examiners, that the capital stock of the Bank had become impaired to the extent of one-half its par value. Thereupon, on December 5, 1896, said Comptroller issued the following notice to the Bank:

"TREASURY DEPARTMENT.

Office of Comptroller of the Currency,

Washington, D. C., Dec. 5, 1896.

Whereas, it appears to the satisfaction of the comptroller of the currency that the capital stock of the Commercial National Bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency:

Now, therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its captital stock by assessment upon its shareholders, pro rata, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said Bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,

Comptroller of the Currency.

To the Commercial National Bank, Portland, Oregon."

Upon the receipt of this notice and on December 14, 1896, the Board of Directors of the Bank passed this resolution:

> "Resolved that in accordance with the notice served upon this association by the Comptroller of the Currency, under date of December 5, 1896, and received by this Bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this Bank of 50 per cent or $50 per share payable at this bank on or before March 11, 1897.
>
> And resolved that the Cashier of this Bank be and he hereby is authorized and instructed to serve upon each shareholder of the Bank a legal notice of the above assessment, by sending such notice to each shareholder's address by registered mail."

On December 17th, 1896, the Cashier served a notice of said assessment upon the defendants in error and each of the other shareholders. Said defendants failed to pay this assessment and in consequence on March 18th, 1897, the Board of Directors, to satisfy the same, passed a resolution directing a sale of the delinquent stock to be made at public auction on May 5th, 1897, and on that day, and upon notice pursuant to the provisions of the statute, this stock was sold for the exact amount of such assessment.

At the time of said sale defendant Henry Weinhard was the owner of one hundred shares, and defendant George H. Williams of sixty shares of the capital stock.

The proceedings in connection with this assessment were taken under and pursuant to the directions of the Comptroller of the Currency; all the resolutions and notices were upon and according to forms prescribed and issued by said Comptroller and the assessment was levied and collected, under his direction, by the authority, and in the manner always pursued in such cases prior to that date and for some time subsequent thereto, and until the decision in *Hulitt vs. Bell*, 85 Fed. 98, hereinafter referred to.

More than two years after this assessment and on February 23, 1899, prompted presumably by this decision in

Hulitt vs. Bell, these suits were instituted to recover damages for a conversion of the stock growing out of said sale, the gravamen of each action being that the Board of Directors had no authority to make such assessment and sale because that power rested with the shareholders alone. The defendants in error recovered judgments in the Circuit Court of Oregon for the value of their stock at the time of sale, which was found to be $30 per share, which judgments were affirmed on appeal by the Supreme Court of that State and thereupon writs of error were applied for and allowed. For the purposes of this brief and to avoid confusion, the transcript of record wherein Henry Weinhard is defendant in error—being No. 109 upon the docket for the present term—will be used for reference.

SPECIFICATION OF ERRORS.

The substantial errors alleged to have been committed by the Supreme Court of Oregon are specified to be:

First: In overruling the demurrer to the complaint, when the cause of action stated therein was placed upon the sole ground that the Board of Directors of a National Bank had no power, under the direction of the Comptroller of the Currency, to levy an assessment or sell stock on account of the impairment of capital, such power being vested in the shareholders only;

Second; In sustaining the demurrer to the first, further and separate defense set up in the answer of the defendant in the State court, whereby said defendant pleaded the action of the Comptroller of the Currency finding an assessment to be necessary on account of the impairment of capital stock and the action of its Board of Directors pursuant thereto, and to the provisions of the Revised Statutes of the United States, which culminated in a sale of the stock in satisfaction of such assessment (*Record*, Answer, pp. 17-20);

Third: In sustaining the demurrer to the second, further and separate defense set up in the answer of defendant in the State court, pleading the action of the directors, under the instructions and approval of the Comptroller, in making the assessment and sale, and alleging that the shareholders should be estopped to complain thereof because of their failure to take steps to defeat the same (*Record*, Answer, pp. 20-26);

Fourth: In holding that the plaintiff in error wrongfully converted the shares of stock belonging to the defendants in error and awarding judgment accordingly (*Record*, Assignment of Errors, pp. 6, 7).

Perhaps a sufficient specification of the errors relied on in this court is expressed in the contention that the judgment of the Supreme Court of Oregon is erroneous because it is based upon the false assumption that under the United States Revised Statutes relating to National Banks, the shareholders alone are empowered to levy assessments to make good an impairment of capital stock and that any such assessment made by a Board of Directors, or sale pursuant thereto, is invalid; also because the shareholders stood by and failed to take any steps to put the association into liquidation, as they might have done, and are therefore estopped to complain of the action taken by the directors.

ARGUMENT.

As the decision of these cases turns upon a correct interpretation of section 5205 of the United States Revised Statutes, read in connection with the other provisions of the National Bank Act—sections 5133 to 5244, with amendments—the law on this subject, in its entire scope and purpose, will be briefly considered before taking up this particular section.

The purpose of Congress in enacting this law was to provide a complete banking system for the United States. In

meeting the demands arising from the commercial relations of each State and between the several States, it was considered requisite that a National Bank Note should pass current everywhere, and to that end the credit of the nation is pledged for its payment. The provisions of the act to insure the safety of depositors and other creditors show a keen exercise of human foresight. Among these may be mentioned: (a) The entire original capital must be paid in, section 5140; (b) An adequate reserve must be maintained, section 5191; (c) The liabilities of any one person to the Bank must not exceed one-tenth of the capital actually paid in, section 5200; (d) Loans are not permitted to be secured by the capital stock, section 5201; (e) A limitation is put upon the indebtedness which the Bank may create (except to depositors and for its notes, etc.) which is measured by the amount of its capital stock actually paid in and *undiminished* by losses or otherwise, section 5202; (f) A prohibition against borrowing money upon the pledge of its notes or circulation, section 5203; (g) Its capital stock is required to be kept intact, and if losses occur, they must be made good before dividends can be paid, section 5204; (h) Each shareholder is made responsible for the debts of the association to the extent of the par value of his stock, *in addition to the amount invested therein*, section 5151.

The general business and management of a National Bank which is defined by the act to be a "body corporate" is intrusted to its Board of Directors. (*First Nat. Bank vs. Nat. Exchange Bank*, 92 U. S. 122-127.) Section 5136 provides that it shall have power:

> "*Sixth.* To prescribe, by its Board of Directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"*Seventh.* To exercise, by its Board of Directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

And, again, by section 5145, it is declared that the "affairs" of the corporation "shall be managed by not less than five directors," which is equivalent to prescribing that within the powers of the corporation, except as expressly modified by the Act under which its charter is held, the Board of Directors is entrusted generally with the management of the business and affairs of the Bank, and their acts, done in good faith, cannot be called in question.

Dana vs. Bank of U. S., 5 Watts & Serg. 223, 246;
Hutchinson vs. Green, 91 Mo. 367, 375.

A clear statement of the relations borne by the directors and stockholders, respectively, to a corporation is to be found in the case of

Beveridge vs. N. Y. E. R. Co., 112 N. Y. 1,

wherein the Court, speaking by Gray, J., uses this language, at pages 22 and 23:

"All powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. The expression of the corporate will, and the performance of corporate functions, in the management of a corporation, may originate with its directors, where the law or the by-laws have not expressly restricted their authority and made their action to rest for its validity upon the concurrence of the stockholders, by previous action or subsequent ratifica-

tion. Within the chartered authority, they have the fullest power to regulate the concerns of a corporation, according to their best judgment, and contracts, which the corporation could legitimately make, come within the scope of the ordinary powers of corporate management. (*Leslie vs. Lorillard*, 110 N. Y. 536.) The duties of directors are of the most responsible kind, and it is in the purview of the law that they should be held to a full accountability for their acts to the stockholders, towards whom they occupy the relation of trustees, with all which that term implies of power and responsibility. In the management of the affairs of the corporation, they are dependent solely upon their own knowledge of its business, and their own judgment as to what its interests require. The error, in the supposition that, in the case of a railroad corporation, a lease of the railroad property requires for its validity the authorization of stockholders, has its source in the idea that such an act involves an organic change, which either the law inhibits or, if it permits, vests the power to make only in the corporators, either by express enactment, or by necessary or natural implication. If such a contract, as the lease by a railroad corporation to another of its railway, was not within the powers expressly conferred by general laws, by which, as by the charter, the corporate powers are measured, it would be *ultra vires*, and could not be made at all. But, as the act of 1839 authorizes the making of such a contract, and the law does not regulate the manner of making it, or impose restrictions with respect to it, I think it must logically follow that the power to make it is, like all other general powers of management, lodged in the directors. They must exercise all the powers of a corporation, subject to the general law and to the by-laws of the company, and, where they act in good faith and without fraud or collusion, their action is conclusive upon the corporation. As agents of the corporation, we must find the extent of their powers by an examination of the laws under which it was created and exists. Those laws, in defining the powers of the corporation, define the scope of the directors' powers to act for it. Judge Comstock, in *Hoyt*

vs. Thomson's Executor, (19 N. Y. 216), said: 'The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds towards his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former. . . . . But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke, those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers."

By section 5147 each director is required to take an oath to diligently and honestly administer the "affairs" of the association so far as the duty devolves upon him.

In looking at the exceptions to the exercise of the power of management by the directors, and wherein it is expressly provided that the consent of the shareholders shall be necessary to the performance of certain acts by the association, it becomes apparent that whenever it is intended by the Bank Act that the powers of a corporation formed thereunder are to be directed or controlled by the shareholders, the word "shareholder" is specifically used in that connection. The following instances may be enumerated: Section 5149, relating to the election of directors, provides that shareholders representing two-thirds of the stock may fix the day therefor, if the directors fail so to do. The act of Congress approved July 12, 1882—22 *Stat. L.*, p. 162—provides for an extension of the corporate existence "by the consent in writing of shareholders owning not less than two-thirds of the capital stock." Section 5220 requires the vote of shareholders owning two-thirds of the capital stock in order to go into liquidation. Section 5143 makes a like vote of the shareholders necessary to effect a reduction of the capital stock. Section 5142, as amended by section 1 of the act ap-

proved May 1, 1886, requires a similar vote of the shareholders to increase the capital stock. Particular attention is called to the circumstance that prior to this act of 1886 section 5142 had always been construed to authorize an increase of the capital stock by the directors, though not so expressly declaring, if the original articles of association provided that it might be increased to a specified maximum, the time and extent of such increase being confided to their discretion. It will be noted that by the amendment of 1886, the clause primarily in section 5142, providing that an increase of stock might be anticipated through the articles of association, was eliminated, thus leaving this and section 5143 upon a parity in all respects, so far as shareholders were concerned. Section 2 of the act of May 1, 1886, also requires a like vote of the shareholders in order to change the name of the bank, or its place of business. By section 5154 a State bank is permitted to become a national association when the change is authorized by the owners of two-thirds of its capital stock.

These references show that whenever a power is to be exercised under the act which would alter the contract of membership which the shareholders originally entered into, or change the fundamental purpose of the corporation, the policy of the law is to delegate the control or direction of that power to the shareholders; but it does not pretend to give them any general powers in the management of the corporation.

Again, it is apparent from a reading of the Bank Act that wherever a vote of the holders of stock is provided for, except in fixing a day of election, the shareholders cannot themselves perform the acts regarding which their votes are to be taken. Their authority is limited to creating a condition precedent, and thereupon all subsequent and ministerial or executive action rests with the directors. The

shareholders vote to increase the capital stock, and having done so, their authority ends. They cannot actually issue stock or take any further steps, for all this must be done by the directors. So, in case of the decrease of capital, or liquidation, or any other instance where a vote of the shareholders is provided for.

The law points out when the shareholders may act, and leaves all else to the directors; the manifest intent being to leave nothing to conjecture in that regard.

This enumeration of the instances in which the shareholders may take part in the conduct of a national bank, establishes the line between them and the directors, the latter, with these exceptions, being expressly authorized to manage the "affairs" of the association; to exercise its powers. Why enumerate the instances in which the shareholders shall take part, unless they are to be exclusive of all others? Could it be claimed that under section 5142, as originally enacted, any vote of the shareholders became necessary to authorize the directors to increase the capital stock to the maximum permitted by the articles of association? If so, why was the section afterwards amended so as to make the consent of such shareholders a condition precedent to such increase? And if it were not contemplated by the original section to leave this discretion to the directors, why did the succeeding section 5143 at all times expressly provide in contradistinction to the other, that no decrease of the capital stock should be made without the consent of two-thirds of the shareholders? The conclusion would seem to be irresistible that the framers of the law originally intended to leave any increase of the capital stock authorized by the articles of association to the discretion of the directors and to make a decrease thereof dependent upon the consent of the shareholders. Afterwards, by amendment to 5142, their consent became equally necessary in both instances.

The directors and shareholders, respectively, derive their authority from the act and neither can extend or diminish the powers of the other.

Section 5205 reads as follows:

> "Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses, or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. [*And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment; as provided in this section; it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders.]

The various provisions of the Bank Act constitute an essential part of the contract entered into by the shareholder when subscribing for his stock. One of the most important features of the act is disclosed in its provisions, already

noticed, for maintaining the stock at par. By section 5199, the payment of dividends is prohibited, except from the net profits; and before the declaration of a dividend, one-tenth of such profits for the preceding half year must be carried to its surplus fund until the same shall amount to twenty per cent of the capital stock. All these precautions for the creditors are reinforced by the provisions of section 5204 prohibiting the withdrawal of any capital, or the making of dividends if, from any cause, losses have been sustained equal to the undivided profits then on hand; also by section 5202 inhibiting the Bank from becoming indebted in a sum exceeding the capital stock then actually paid in and remaining *undiminished* by losses or otherwise. This section shows it was contemplated that the capital might become diminished, and of this the shareholder was put upon notice. It may be also remarked that section 5205 mentions impairment of the capital by "losses or otherwise," using the same words which appear in 5202.

The shareholder in a national bank, by entering into that relation, subjects himself to all the obligations created by the statute.

Studebaker vs. Perry, 184 U. S. 258-261.

The Directors are as much bound to maintain the capital of the Bank unimpaired, as to perform any other duty with which they are charged by the act. The shares became liable to be assessed when they were subscribed for, and the shareholders were not only charged with notice of that fact, but they assumed this liability. The payment of an assessment to make up impaired capital is not in the nature of a further investment in the capital stock by the shareholder. His holding of stock remains the same, but has thereby cost him a greater amount; not that the investment is actually greater, in contemplation of law, than before payment, but because a part of the original investment has

disappeared, and under his contract with the association the shares are to remain fully paid up. As a shareholder he becomes subject to this liability until legally relieved therefrom.

Earle vs. Carson, 188 U. S. 42-51.

The levy of an assessment is merely to call in and restore to the active business of the Bank sufficient to repair the fund which was created when the association was organized, for the purpose of maintaining that fund in its entirety in order that the business of the Bank may continue. It was not in any degree equivalent to creating new capital stock because the number of shares of the corporation, the par value thereof, the holders and their relative positions and influence were not altered thereby. The holder of one hundred shares of the capital stock had just as much influence in voting, as compared with the total number of shares, after the payment of the assessment as he did before. He had simply replaced a portion of his share of the common investment which had been diminished by reason of losses.

By section 5139, it is declared that no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors shall be impaired. It is the policy and intent of the act that creditors shall at all times be secured to the extent of the full capital, and also by the liability of the shareholders for an equal amount (section 5151.) The capital must not be less than the law requires (section 5138.) By section 5141, if, through a delinquent sale, or otherwise, the stock of the association shall become reduced below the minimum of capital, it must, within thirty days thereafter be increased to the requisite amount, or a receiver will be appointed. By section 5191 a lawful money reserve is also required to be kept by national banks, in an amount varying from fifteen to twenty-five per cent of the aggregate of their notes and deposits, ac-

cording to locality. The capital stock is the primary source from which the creditors of the Bank derive their security, and it is for their protection that the law provides for this capital and for its maintenance against losses and impairments. The words "in addition to the amount invested in such shares" occurring in section 5151, imply that a shareholder may be called on to make good any diminution of the par value of his stock, and that he cannot escape liability to creditors equal to that par value, although he may have paid in a greater amount than the face of his shares.

The condition precedent upon which the acts of the directors under consideration were founded was the fact of the impairment of the capital stock of the Bank *as determined and declared by the Comptroller of the Currency.* No vote of the shareholders was necessary to establish this impairment; it was a question wholly within the jurisdiction of the Comptroller, and when decided by him it furnished the foundation for the assessment. His notice to the bank was conclusive of this fact, and thereupon the collection of this assessment became a *duty*, purely ministerial and executive, which devolved upon the directors who had no discretion in the premises. It was the *law* which made this assessment necessary and not the vote of the directors, who were simply obeying the express provisions of that law. It will be noted that the language of this section is mandatory; it provides that the Bank "shall" meet a deficiency in the capital stock by assessment. It will be further noted that the assessment so provided for may be not only for the purpose of restoring an impairment of capital stock, but also to pay up an *original subscription* pursuant to section 5140. *The two contingencies are classed together.* As to this original subscription, the liability to pay is unquestionably created by law without the action of the stockholders or directors; an impairment of capital is by section 5205 placed upon the same footing, which section also provides that if any shareholder shall

neglect or refuse to pay the assessment as therein required, it shall be the duty of the directors to cause his stock to be sold to make good the deficiency; in the same way the directors are empowered by section 5141 to sell the stock of a shareholder who has failed to meet any original installment required to be paid thereon. *The procedure is the same in both cases.* Again, section 5205, after making it mandatory to repair the capital, imposes a penalty if the association shall "fail" to pay up its capital stock. The use of this word "fail" would seem to be inappropriate if the restoration of capital were a matter dependent upon a vote of the shareholders to levy an assessment for that purpose. The law provides a remedy in case of failure to pay up, which imports that the makers of such law contemplated that an assessment would follow a notice from the Comptroller as a matter of course. And herein lies the vice of the contention by the defendants in error that the shareholders were entitled to determine whether this assessment should be levied as the alternative to liquidation, or the appointment of a receiver; which contention involves a substitution of the minor for the major proposition. It reverses the whole machinery of the act. *The Bank was formed to exist and do business pursuant to the policy of the act, and not to liquidate or go into the hands of a receiver.* Liquidation is only a contingency which the shareholders may take advantage of in case the enterprise proves unsatisfactory. In order for the Bank to accomplish its legitimate purpose, it was bound to discharge certain obligations if they arose under the provisions which have been already pointed out. The act contemplates that the capital of a Bank may become impaired, and it is the policy of the law to have that deficiency made up. The act also expressly contemplates the continuance of business by a bank when its reserve has been impaired.

Earle vs. Carson, 188 U. S. 42-45.

The same rule should obtain in case of an impaired capital. To repair capital is not to change the fundamental, organic character of the corporation or to alter the relations existing between the shareholders, and it is only in such cases that the general law confers a right upon the shareholders to act. The levy of this assessment was not a change in the purpose of the corporation, but was in furtherance thereof, and therein lies the distinction between these cases and *Railway Co. vs. Allerton*, 18 Wall. 233. Suppose the impairment in the capital of the plaintiff in error had been but two or five per cent. To replace this by an assessment could not certainly be claimed to work a change in the fundamental character of the association. As before pointed out, the impairment might have been a portion of the *original capital* which had not been paid up, and was called for by assessment under section 5205. The levy of this assessment effected no such radical change in the management as an assignment of the property of the corporation for the benefit of creditors, which the directors might unquestionably make.

Hutchinson vs. Green, 91 Mo. 375;
De Camp vs. Alward, 52 Ind, 468-473.

The levy of assessments to meet the requirements of corporations engaged in various enterprises is a matter of such common occurrence as to require no enumeration or elaboration. Under the general rule of decision at this day these assessments, when authorized by the charter or the law under which the corporation is created, are made by the directors, although they may not be specially empowered to to do so by the statute creating such corporation. This is undoubtedly so as to calls for unpaid capital.

Hatch vs. Dana, 101 U. S. 205-214;
The Ambergate etc. Ry. Co. vs. Mitchell, 4 Exch. 540, 542;
(Also cited as *Ry. Co. vs. Mitchell.*)
Cook on Stock & Stockholders, § 109.

The same rule should apply to the assessment in these cases, as both calls and assessments are classed together in section 5205. The terms are often used interchangeably.

***Budd vs. Multnomah St. Ry. Co.*, 15 Or. 413, 416;**

***Penobscot R. Co. vs. Dummer*, 40 Me. 172;**

2 *Private Corporations* (Clark & Marshall), § 497, (p. 1524).

A great advance has taken place in this respect since the decision in *Ex parte Winsor*, 3 Story, 411, and *Marlborough Mfg. Co. vs. Smith*, 2 Conn. 579, relied on by the other side.

Corporations are no longer hampered, in the transaction of business, by the ancient rules governing such bodies, which were founded upon the theory that because created without the organs of speech, they might only express their will in writing, under corporate seal, and could not promise or accept a deed in any other manner, nor take by livery of seisin, or commit a tort, or do various other things.

Under section 5220 the Bank might go into liquidation by a vote of the shareholders representing two-thirds of its stock. This was their remedy if they chose to pursue it, and this was one of the contingencies which might defeat the assessment, and so it was provided against by section 5205. Dissolution was a consequence to follow a failure to repair the capital, as the appointment of a receiver under section 5234 is the penalty for violating sections 5226 and 5227. Will it be claimed that the shareholders have a right to vote upon the question of violating those sections? If a national bank should fail to redeem its notes as required by section 5226, the penalty would be a receiver, but it could scarcely be contended that such failure must result from a vote of the shareholders; and no more so a failure to maintain its reserve under section 5191, which may also provoke the appointment of a receiver.

By the first clause of section 5205 it becomes the duty of the association to make good any failure to pay up its original capital, or any impairment of that capital, by an assessment of the shareholders within three months after notice from the Comptroller. *This is to be done in the regular course of business during its corporate life.* Suppose that but eighty per cent of the original capital of this bank had been paid in when the Comptroller issued his notice; then the remaining twenty per cent would be included in the assessment, and this twenty per cent might have been the full amount needed to repair the capital. If the shareholders had a voice to determine whether such a residue of capital should be called in under section 5205, then they equally had a right to decide upon the payment of *any* installment under section 5140, and which they could only defeat by voting to go into liquidation; but it would certainly not be contended that no such installment could be called in under section 5140, nor any sale of stock made under section 5141, in case of failure to pay up, unless the shareholders were first afforded an opportunity to vote whether such action should be taken. The policy of the act would equally be defeated in both cases under such a construction.

By the express terms of section 5220 a vote of shareholders *owning two-thirds of the stock* is a condition precedent to liquidation. If the action of the shareholders were necessary to levy an assessment under section 5205, the question might be decided by a *majority vote merely* at their meeting, under the general rule in such cases, there being no special provision in the act on the subject. A bare majority might decide against the assessment and so force the association to dissolution and a receiver by *indirection*, when the act contemplates that such a result can only be effected by a vote of two-thirds of the stock. Except in the election of directors, a vote of the holders of two-thirds of *all* the shares is requisite under the Bank Act to the exercise of any power

expressly delegated to the shareholders; but under the theory of the other side, a majority vote at a meeting of shareholders representing a bare majority of the stock could defeat an assessment under section 5205 and force the corporation to a dissolution. Instead of liquidation being accomplished by a direct vote of two-thirds of the stock, under section 5220, it would thus be indirectly brought about by the naked majority of a quorum competent to transact business. The courts will not construe a statute in such manner as to defeat principles of sound public policy, nor against the obvious intention of its makers. By section 5136 of the act a body corporate formed thereunder is to exist for twenty years, "unless it is sooner dissolved according to the provisions of its articles of association, *or by the act of its shareholders owning two-thirds of its stock*, or unless its franchise becomes forfeited by some violation of law." No mention is made in this enumeration of causes which work a dissolution, of such a further contingency arising if *a majority of the shareholders have voted against an assessment to restore a capital impaired*, and none such seems to have been contemplated. The law gives the directors no discretion to decide whether the bank shall continue or liquidate, *but it is their duty to keep the Bank going until the holders of two-thirds of the stock vote otherwise;* the levying of an assessment is not a discretionary act on their part, if an impairment of capital has been declared by the Comptroller to exist, and the statute creates no presumption of inability to continue business on account of such impairment no more than if the reserve had been reduced below the legal requirement.

Earle vs. Carson, 188 U. S. 45.

If a national bank were notified by the Comptroller that it was violating the law in making excessive loans or purchasing its own stock, or lending money on real estate, it must repair the error or the penalty will be a receivership. The directors

managing the Bank must comply with the law or the Comptroller will enforce it, but in no sense can the avoiding of that penalty be said to be an exercise of discretion confided to the association. So, failure to comply with the notice to make good an impairment of capital will be followed by a receivership, but to make good that impairment is not an exercise of discretion but a proper compliance with the provisions of the law which require the stock to be maintained at par. It is the position of the other side that a notice from the Comptroller to make good impaired capital is a demand on the association to exercise its discretion in assessing or submitting to a receivership, but this is no more an exercise of discretion than if the Bank were forced into the hands of a receiver under section 5191 or 5208 or 5201, or any other provision of the act where the appointment of a receiver may be the consequence of failing to keep its requirements. In short, receivership is the *penalty* for a failure to comply with the directions of the act, but it cannot be said to be an alternative course properly open to the corporation as a matter of choice. It is conceded, however, that the way is open at all times to the shareholders to put the association into liquidation under section 5220; but that can only be effected by a vote of two-thirds of all the shares. With this single exception, the Bank is to continue in business until the termination of its life under the Bank Act, or any extension thereof; it is the duty of the directors to carry on the Bank and comply with the law in every respect. *They have no discretion to violate it.*

There was no snap judgment upon the shareholders in the proceedings under consideration. By section 5205 they were given three months after notice in which to pay the assessment, and no sale could be made until thirty days thereafter. If they desired a dissolution of the Bank, it only became necessary for them to have a meeting called for that purpose

and secure a favorable vote from the owners of two-thirds of the stock. *In default of such action on their part it was the clear purpose and policy of the law that the Bank should continue in business with its capital restored.* The shareholders cannot lie by and fail to act, and then take advantage of such failure by claiming that their shares have been converted, and so practically obtain a disposal of such shares through their own negligence. It would not be just to permit them to allege injury under such circumstances, and they should be estopped to do so. If these judgments are affirmed, it must necessarily follow that the parties who bought in this stock and paid $50.00 a share therefor, are put in a worse position than they who permitted it to be sold and voluntarily neglected to avail themselves of the right to put the Bank into liquidation.

In levying this assessment and making the sale, the directors acted under the instructions of the Comptroller and used the blanks furnished by that official pursuant to the established and unbroken practice of his office to that time. Under his interpretation of the statute it was held to be the duty of the directors to levy assessments under section 5205. and this procedure always obtained until after the decision in *Hulitt vs. Bell*, ante.

The construction given to a statute by those charged with its execution, though not controlling, is entitled to the highest consideration of this court and will not be overruled without cogent reasons.

U. S. vs. Moore, 95 U. S. 760, 763;
Hastings etc. R. R. Co. vs. Whitney, 132 U. S. 357, 366.

In case of ambiguity, contemporaneous and uniform executive construction is regarded as decisive.

Brown vs. U. S., 113 U. S. 568, 571.

This Court will take judicial notice of the rules and regulations prevailing in the office of the Comptroller of the Currency and the acts of that official.

Caha vs. United States, 152 U. S. 211, 222;
Keyser vs. Hitz, 133 U. S. 138, 146;
Jones vs. United States, 137 U. S. 202;
Heath vs. Wallace, 138 U. S. 573, 584.

The decision of the Supreme Court of Oregon is based upon expressions occurring in *Hulitt vs. Bell*, 85 Fed. 98, and *Delano vs. Butler*, 118 U. S. 634, all of which are recognized to be *dicta*. It is urged, with all due respect, that the Oregon Supreme Court—following *Hulitt vs. Bell*—committed the error of permitting its judgment to turn upon considerations of convenience rather than a correct interpretation of the provisions of the Bank Act. The Court (Record, pp. 50, 51) assumes that there is no legal obligation on the part of the shareholders to pay an assessment levied under section 5205, unless it is voluntarily authorized by them, ignoring the fact that the shareholders by their subscriptions to the stock became liable, if called on, to pay any such assessment, under the direction of the Comptroller, or submit to a sale of their stock for its satisfaction; also ignoring the further fact that the way open for the shareholders to defeat this assessment was not to vote against it, but by voting to have the association go into liquidation. When the Court, speaking of the contingency of an assessment, and the right of the shareholders to determine the course to be pursued touching its levy and collection, uses this language: "And we think that the law contemplates that this right shall be exercised by them alone," it fails to discuss or expound the intent and purpose of Congress in providing certain instances in which the shareholders shall act, or to point out why those instances should not be exclusive of all others.

As a general proposition, the powers of stockholders are more restricted than those of directors. They cannot, either separately or collectively, contract for the corporation nor make a sale or mortgage of corporate property.

Smith vs. Hurd, 12 Met. 371, 385;
Humphreys vs. McKissock, 140 U. S. 304, 312;
Gashwiler vs. Willis, 33 Cal. 11, 19;
Blood vs. Water Co., 113 Cal. 221;
Allemong vs. Simmons, 124 Ind. 199.

The Court also commits the error of assuming that because the shareholders have the means to avert an assessment by putting the Bank into liquidation through a vote *of two-thirds of the stock*, this circumstance gives them the right to exercise the function of the directors, and decide, in the first instance, perhaps by a mere majority vote, whether an assessment shall be levied. It would seem to have been the manifest purpose of Congress to avoid the possibility of a question arising between the directors and shareholders as to the exercise of authority, by expressly mentioning every contingency in which the latter could have a voice in the management of a national bank. Courts cannot engraft on the law exceptions or limitations. Why enumerate these contingencies if they were not to be exclusive of all others, and why afterwards amend the act in two or more instances so as to extend this right of the shareholders to cases not originally provided for, if the question as to when that right should properly be exercised were to be left, after all, to the determination of the courts? The learned judge who wrote the opinion in *Hulitt vs. Bell* assigns as one reason for his conclusion that the shareholders, rather than the directors, are empowered to make an assessment, the circumstance that as to the latter "their holdings of the capital stock may be but a small proportion of the entire amount. They ought not to exercise control over a matter

so vital, unless the statute gives it to them in unmistakable terms." This language is quoted with approval by the Oregon Supreme Court. But both courts seem to overlook the fact that the Bank Act not only requires that the directors shall diligently and honestly discharge their sworn duties, but also provides severe penalties in case of a failure to comply with this obligation. These courts also fail to notice the fact that directors are annually elected by the shareholders, and such selection is presumably made advisedly and on account of their peculiar fitness for the position.

Hulitt vs. Bell is not authority upon the question under discussion because it was not essential to the decision in that case, as the suit was dismissed upon another ground. It is stated in the opinion by Judge Sage that upon this question no direct authority had been cited. It was a matter of first impression. *Delano vs. Butler*, 118 U. S. is referred to. That case arose out of the failure in 1882 of the Pacific National Bank of Boston. An assessment, under section 5205 of the Bank Act had been voted by the shareholders at their annual meeting, and had been paid in by most of them. *No question as to the validity of that assessment was involved;* it was an action to collect a subsequent assessment levied by the Comptroller of the Currency under section 5151. With reference to the prior assessment under section 5205 this Court, speaking by Mr. Justice Matthews, said that it was a *voluntary* assessment made by the shareholders upon themselves for the purpose of continuing the business of the Bank, and was not a bar to a further assessment by the Comptroller under section 5151 for the purpose of paying the creditors of the corporation, pro rata, and winding up the concern. No consideration of section 5205, upon the point involved here was attempted, nor was it necessary; and while some language may be found in the opinion which appears favorable to the other side, it is in no manner conclusive upon this

point. It does not relieve the Court from a consideration of the proposition, *de novo*.

The decision of the Supreme Court of Oregon rests upon what that Court is pleased to denominate a "judicial dictum" by Judge Sage in *Hulitt vs. Bell*, fortified by some general expressions by Mr. Justice Matthews in *Delano vs. Butler*, not pertinent to a decision of that case, and the broad proposition that shareholders should be consulted before being afflicted by assessments; but the learned Court utterly fails to consider the effect of inclusion and exclusion of powers, as applied to the Bank Act.

Respectfully submitted,

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For Plaintiff in Error.

PLATT & PLATT,

Of Counsel.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1903.

Commercial National Bank,
Plaintiff in Error,
v.
Henry Weinhard.
No. 109

Commercial National Bank,
Plaintiff in Error,
v.
George H. Williams,
No. 110.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF DEFENDANTS IN ERROR.

GEO. H. WILLIAMS and GEO. H DURHAM,
Attorneys for Defendant in Error.
THOS. O'DAY, of Counsel.

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STATEMENT.

These actions were brought by George H. Williams and Henry Weinhard against the defendant to recover the value of stock which plaintiffs held as stockholders in the Commercial National Bank of Portland. Plaintiff Williams owning sixty shares of the par value of $6,000, and Plaintiff Weinhard owning one hundred shares at the par value of $10,000. The defendant is a national bank, organized under the Act of Congress known as the National Banking Act. A brief statement is as follows: The defendant, a national bank and a going concern, had been in business for a long time prior to 1894. During the panic of 1893 the bank suspended, but soon reopened its doors. In February, 1894, Wells, Fargo & Co. purchased a majority of the stock and thereby became the controlling stockholder. Subsequently to purchasing this stock, to-wit: March 14, 1894, the capital stock of the bank was increased from $250,000 to $500,000. The bank continued doing business until October 5, 1896, when the Board of Directors of the defendam bank passed a resolution requesting the Comptroller of the Currency to make an assessment on the bank stock of 50 per cent, or $250,000. At that time the directors of the bank were J. J. Valentine, president of Wells, Fargo & Co.; Homer S. King, cashier of Wells, Fargo & Co.; R. M. Dooley, sent from California by Wells, Fargo & Co. to oversee this bank; Eugene Shelby, managing agent of Wells, Fargo & Co., Portland; Richard Koehler, of the Southern Pacific Co. All of whom, except Mr. Valentine, held stock transferred to them by Wells, Fargo & Co. in order to qualify them as directors (see Reply of Defendant Williams, pp. 9-10). The other directors being W. M. Jack, John McCracken, H. C. Wortman and R. L. Durham, and plaintiffs claim that this assess-

ment was made at the instance and request of Wells, Fargo & Co., and for the sole purpose of freezing out the minority stockholders of defendant association. The Comptroller of the Currency, as plaintiffs allege, in compliance with this request, gave notice to the defendant bank, under section 5205 Revised Statutes of U. S., requiring the defendant association to make an assessment of 50 per cent upon the stock or to go into liquidation.

As soon as this notice from the Comptroller was received, this same Board of Directors, without calling a meeting of the stockholders, or otherwise, undertook and did, assess the stock of the bank $50.00 per share; and afterwards on May 5th, 1897, the stock of these plaintiffs was sold at public auction and purchased by Wells, Fargo & Co. or their representatives for the amount of the assessment, to-wit: $50 per share, which money was paid into the bank as a result of said sale.

The answer of the defendant admits that the assessment was made by the Board of Directors without consulting the shareholders, and at page 19 of the Abstract is the following allegation in the Weinhard answer, which allegation is also in the Williams answer, to-wit:

> "That in pursuance of said resolution the plaintiff's said 100 shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 P. M., at the banking house of the defendant in the City of Portland, State of Oregon; that at said sale the defendant received for the said 100 shares of stock the sum of $5,000.00 and no more, and that the whole number of said 100 shares of stock was the least amount of the said 100 shares of stock which would make the amount of the said assessment thereon."

The case was tried to the Court without the intervention of a jury and upon the trial the Court found the value of the shares of the stock at the time of the conversion to be $30.00 per share, and judgment was rendered in the Williams case for the sum of $1,800, and in the Weinhard case for the sum of $3,000.

POINTS AND AUTHORITIES.

I.

A corporation can only be created by the sovereign power of the State, and in the creation of a corporation, such as the defendant herein, the government grants to it certain powers which is a part of the State's sovereignty. When these powers are granted, until revoked, the corporation may exercise the powers granted.

Thompson on Corporations, Vol. 1, Sec. 35.

Bank vs. Earl, 38 U. S., 517.

II.

But it is an elementary principle that all grants of sovereignty to a corporation, all delegation of power, which is to be exercised under such a grant, must be strictly construed, and to this end, two things stand out as cardinal principles, namely: (a) That a corporation can only do those acts which are delegated and prescribed in the grant, or to state it in other language, its powers are measured strictly by its charter and all powers not specially granted by the charter are excluded. (b) It is a fundamental principle that the powers delegated to a corporation must be ex-

ercised by the agent or agency named in the grant. Or, in other words, the corporation can only act through such officers or agents as the grant or charter proscribes or designates.

Bank vs. Earl, 38 U. S., 517.

Bank vs. Deveaux, 5 Cranch, 61.

III.

When the powers of the corporation are challenged there is primarily no distinction between the exercise of the power granted and the manner or agency by which said power is exercised. That is to say, it is as valid an objection to the acts of a corporation to say that the acts have not been performed by the agents or officers named in the charter, as to say that the act is not within the powers granted by the charter, which is merely another way of saying that when the acts of a corporation are challenged, it must not only appear that the corporation had the power to do the act, but the act itself must have been done in the manner and through the officers named in the charter or grant of power.

Bank vs. Earl, 38 U. S., 517.

IV.

While directors may, as a general rule, exercise the ordinary powers of the corporation, yet all extraordinary powers as contra-distinguished from the ordinary powers of the corporation must be exercised by the shareholders alone.

Morse on Banking, Sec. 127.

Ry. vs. Allerton, 18 Wall, 233.

Ry. vs. Ry., 136 U. S., 305.

Boone on Banking, Secs. 83-84-197.

Thompson on Corporations, Secs. 3977-8-2076-3979.

Brown vs. Bradford, 103 Iowa, 378.

Lively vs. Omaha Hotel Co., 5 Neb., 74.

Boone on Banking, Secs. 83-84-197.

V.

The directors can not give away the funds of the bank without authority from the shareholders.

Boone on Corporations, Sec. 83.

Morse on Banking, Sec. 127.

Holder vs. Ry., 71 Ill., 106.

Bradford Ry. vs. Bouser, 48 Pa. St., 209.

VI.

While the directors have full power, control, and charge of the funds of the corporation, and for this reason may make an assignment for the benefit of creditors, still the directors have no power to create a fund, that being the duty of the stockholders, because, if the directors could either enlarge or diminish the fund of the corporation they could thereby change the status of the stockholder and place his stock upon a different basis than that assumed by him when he made his subscription.

2 Thompson on Corporations, Sec. 2076.

VII.

Where the legislature gives power to raise a fund in addition to the capital stock by assessment on the stockholders, the directors can not levy such an assessment without authority from the shareholders.

Marlborough Mfg. Co. vs. Smith, 2 Conn., 579.

VIII.

It is essential that the terms "call" and "assessment" should not be used as synonomous terms. A "call" is for an amount due upon

a subscription to stock, but an "assessment" is an amount levied upon a stockholder after his stock has been fully paid up.

23 Ency. of Law, 803 (1st Ed.).

IX.

It is an elementary principle of law that when one becomes a stockholder of a corporation that his relation to the corporation is that of a contract and if as above stated the directors could raise a fund and change the status of this contract without the consent of the stockholder, it would be giving a power to the Board of Directors which has been denied to the law-making power. It would allow the Board of Directors to change the contractual relations of the stockholder to the corporation.

U. S. vs. Knox, 102 U. S., 422.

X.

It has been held that a board of directors has no authority to pass a by-law providing that a person who transfers his stock shall cease to be a member of the corporation.

Commonwealth vs. Gill, 3 Whart. (Pa.) 228.

XI.

It is also held that a board of directors invested with "all corporate powers" has no authority to accept for the corporation an amendment of its charter enlarging the powers of the corporation.

Venner vs. Atchison Ry. Co., 28 Fed., 581.

Ill. Ry. vs. Zimmer, 20 Ill., 654.

Hope Ins. Co. vs. Beekman, 47 Mo., 93.

Commonwealth vs. Cullen, 13 Pa. St., 450.

XII.

Nor have the directors of a railway any authority without the

consent of the shareholders to appropriate money of the company to build a passenger depot in a foreign state to that in which it was created and to which its lines did not extend.

Nashua Ry. vs. Boston Ry., 136 U. S., 356.

XIII.

When the Comptroller of the Currency gives notice to a bank, under Section 5205 Revised Statutes U. S., requiring the bank to make an assessment to repair its stock, the notice is alternative and must require the association to either make an assessment or go into liquidation within three months after receiving notice from the Comptroller. This notice therefore ends the life of the corporation by limitation, unless a new fund is created by assessment on the shareholders. This limitation of the existence of the bank as a corporation is a part of its charter, and it ceases to be a body corporate for the purpose of transacting business under its charter, unless a new fund is created by the shareholders, equal to the amount stated in the notice; which may be 100 per cent or a fund equal to the amount originally necessary to start the bank. Manifestly the creating of this new fund to give new life to a bank is as great a power as to create the bank in the first instance.

Hulitt vs. Bell, 85 Fed., 98.

Delano vs. Butler, 118 U. S., 634.

XIV.

When this notice is given, the corporation ceases to exist as a bank after three months, but the stockholders may extend the life of the corporation by levying and paying the assessment on the stock, but this is clearly an act for the stockholders, and does not in any sense come within the ordinary affairs of the bank, which the directors are authorized to conduct and control.

Delano vs. Butler, 118 U. S., 634.

Where words are used in a statute and given a meaning, it will be presumed that they have the same meaning at all times subsequently used.

Factors and Traders Ins. Co, vs. New Harbor Protection Co., 37 La. An., 233.

Reiche vs. Smythe, 13 Wall, 162.

XV.

Revised Statutes U. S. 5133 provides "associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five." Under the above statute only natural persons in contra-distinction to corporations or artificial persons can form a national bank. Or, as the term is used in the statute, an "association."

XVI.

The word "association" as used in the National Banking Act, is defined therein to mean shareholders, and whenever the word "association" is referred to in the act it refers to the shareholders. And when any act is required to be done by the "association" it refers to the act of the shareholders alone, unless the statute expressly or by implication provides that some other officer or officers are specially designated to perform the act.

Rev. St. U. S., Secs. 5133-5134-5136-5157.

XVII.

Under Section 5205, the Board of Directors has no authority to levy an assessment upon the stock of the shareholders. When a notice has been received from the Comptroller of the Currency that the stock is impaired it is the duty of the shareholders to decide whether an assessment shall be made upon the shareholders or

whether the bank shall go into liquidation; this is a matter solely for the shareholders and not for the directors.

Hulitt vs. Bell, 85 Fed., 98.

Bank vs. Earle, 38 U. S., 517.

Ex parte, Winsor, 30 Fed. Cases, p. 317, No. 17, 884.

Delano vs. Butler, 118 U. S., 634.

Eidman vs. Bowman, 58 Ill., 438.

Marlbridge vs. Smith, 2 Conn., 579.

Gray vs. Portland Bank, 3 Mass., 634.

XIX.

So where a statute provides "if at any time the capital stock paid into said corporation shall be impaired, by losses or otherwise, the directors shall forthwith repair the same by assessment," held, that by this statute a personal liability is not imposed upon the stockholders, and that they can not be assessed for the purpose of paying the creditors; that the purpose of said provision was rather to prevent the continuance of business with impaired capital.

Dewey vs. Trust Co., 57 Vt., 327.

Waterman on Corporations, Vol. 2, Sec. 119, pp. 92-95.

XX.

The distinction between an assessment under Secs. 5151 and 5205 should be kept distinctly in mind. An assessment under 5151 is for the benefit of creditors and affects the relation between third persons and the bank, while the assessment under 5205 is not for the beneefit of creditors, it is merely a relation between the stockholder and the corporation for the purpose of repairing the capital stock. When an assessment is for the benefit of creditors or third parties, it is made by the Comptroller alone, but where it is

made to repair the capital stock, it is made by the association. The only office of the Comptroller in this respect is merely a negative one, which says to the bank, your assets are sufficient to pay your creditors, but you cannot continue business with impaired capital stock.

Delano vs. Butler, 118 U. S., 634.

XXI.

The mere fact that the assessment is necessary to repair the capital as contemplated under Section 5205, does not carry with it the presumption that the bank is not able to pay its depositors and other liabilities to third person. The presumption is the other way. It is presumed that the assets of the bank will pay its debts, and for that reason the statute provides that in case the assessment is not made within three months after notice, a receiver will be appointed and the assets delivered to the creditors of the bank and the surplus to the stockholders, so that when an assessment is called for under Section 5205 it is not for the benefit of the creditors of the bank, but merely for the purpose of keeping the bank in existence.

Dewey vs. Trust Co., 57 Vt., 327.

XXII.

The object of Section 5205 is to create new capital, not in the interests of the creditors of the bank, but merely to affect its status as a going concern. The raising of this new capital is, in no respect, a part of the ordinary affairs of the bank under the control of the directors. It affects what are called "constituent matters which demand the authorization of the stockholders" in contradistinction to the "business affairs of the corporation."

Wells vs. Green Bay etc. Co., 90 Wis., 422 S. C., 64 N. W. Rep., 69.

Re Sovereign Life Ass. Co. (1893), 3 Ch. 279, 287.

XXIII.

It is a rule as heretofore stated, that all grants of power to a corporation must be strictly construed. This is further limited by the rule that whatever presumptions may exist as to the power of the corporation to act where it relates to third persons dealing with the corporation, or where it is for the benefit of the creditors of the corporation, no latitude or presumptions are to be indulged in where the act relates solely to the relations between the corporation and the stockholder, for when a corporation by any act undertakes to affect the status of the shareholders, it devolves upon the corporation to act only when it has express or delegated powers, which must be free from ambiguity. This rule results from the fact that the shareholder's relation to the corporation is that of a contract, affecting his property rights, which can not be impaired without the consent of the shareholder.

Waterman on Corporations, Vol. 2, pp. 92-95.

Ireland vs. Turnpike Co., 19 Ohio St., 369.

Thompson on Corporations, Sec. 5161.

XXIV.

When the stock of a national bank, which is admitted to have been fully paid up, is wrongfully converted, the presumption is that the stock is worth at least its face value and *prima facie* the plaintiff would be entitled to recover that amount. The claim of appellant that plaintiff should have been non-suited because no proof was introduced, is not well taken, for the following reasons: First, it is admitted in the answer that the bank put this stock up at public auction, and it was sold for $50.00 cash per share, which money the bank received, and it is submitted that in an action for

the conversion of property where it is sold by the defendant at public auction, and the defendant admits that it has received the price paid therefore, at the sale, it is not competent for the defendant to claim that the property is not worth the price for which it is sold; and as in this case these shares sold for $50.00 per share, the defendant was liable for that amount without proof, aside from the presumption that the stock was worth its face value. The fact that the Court upon the trial found the value of the stock to be $30.00 per share, $20.00 less than the defendant admitted it had received therefor, is not an error of which appellant can take advantage on appeal.

Sedg. on Damages (8th ed.), Sec. 495.

McMann vs. Duffy, 36 Oregon, 150.

Budd vs. St. Ry., 15 Or., 413.

Evans vs. Koons, 10 Ind. App., 603.

Alderman vs. Cox, 74 Mo., 78.

Foster vs. Meyers, 12 Fed., 842.

XXV.

Second: In order to preserve any question of error, appellant should have relied upon its motion for a non-suit. Having failed to do so, and entered upon its proof as to the value of the stock it was the duty of the Court to find the value regardless of the motion for a non-suit. The appellant by entering upon its proof as to the value of said stock waived any error on its motion for a non-suit.

Bennett vs. N. P. Co., 12 Oregon, 49.

ARGUMENT.

This is an action for conversion. The respondents allege that they were stockholders in the Commercial National Bank. That an assessment was called by the Comptroller of the Curreucy under Revised Statutes, Section 5205. That the appellant through its Board of Directors made an assessment without consulting the stockholders, and under that assessment proceeded to advertise and sell the stock of respondents. The question for the Court to determine, therefore, is, whether or not the directors of a national bank have power under the Act of Congress creating national banks, to levy an assessment upon the stock of the shareholders under the section above quoted. Appellant in its brief has discussed the powers of directors generally with reference to corporations, and while the decisions of the Courts construing various acts creating corporations, may be an aid in construing any given legislative act, still it is important to keep in mind the fact that a corporation has not what is known as a natural birth. It is not like a plant, it has no attributes that are affected by climate or soil. A corporation is a thing that is created by law, and when its acts are challenged, its powers must be measured by the legislative grant creating the corporation, or, as is generally termed, its charter. What a corporation may do; by whom it may be done, are questions that must be answered by looking into the legislative grant which gives the corporation life. For example, in Utah a board of directors may levy an assessment to pay the debts of the corporation because the law creating corporations at Section 2374, Laws of Utah, specially provides that the directors shall do so. (Gary et al. vs. York Min. Co., 35 P. 495). Here the law-making power

creating a corporation especially directed that this particular power of the corporation shall be exercised through the directors. In Wisconsin, under the Wisconsin Act, the board of directors have no such power. In the case of Wells vs. Green Bay Co., 64 N. W., page 69, the Wisconsin Court discusses this question and reaches the conclusion as a general proposition of law that the levying of an assessment upon stock does not come within the general powers of the directors of a corporation.

The Utah case was decided upon a statute and the Wisconsin case states the general rule of law. The general rule is also stated in Thompson on Corporation, Section 8662, Vol. 7, as follows:

> "In the absence of special authority conferred upon them by law, or of the assent of the shareholders evidenced in some form, the directors of a corporation have no power to assess shares which have been fully paid up."

The question therefore recurs, what powers do the directors of a national bank possess, when interpreted by the National Banking Act? Because the authority of the directors must be found in this act, without the aid of any legislation of the various states creating corporations; and unaided by any other legislation of Congress unless it should be an act amendatory of the particular act in question. Plaintiff in error contended in lower court that if the assessment is to be levied by the shareholders, it could be done by a majority, while under Section 5220 liquidation must have a two-thirds vote of all the shareholders, and therfore a small minority could, in case they should refuse to levy the assessment, force the bank into liquidation. The answer to this is that a majority of the shareholders could make the levy if at a meeting of the stockholders,

who are the real owners of the bank, the assessment, after due consideration, was deemed advisable.

Plaintiff in error in the lower Court cited a number of cases which hold that the powers delegated to a corporation must be exercised by such agencies as the charter designates; hence if it were the duty of the directors under the National Banking Act to levy this assessment, the shareholders could not do so. (McCullough vs. Moss, 5 Denio, 575). It is common knowledge that in all large corporations the rule—rather than the exception—is, that a majority of the directors hold only a nominal number of shares of stock, yet if they should refuse to make an assessment the bank would be forced into liquidation even though a large majority of the stockholders should desire an assessment to be made. As above stated, if this power to levy this assessment is delegated by Congress to the board of directors, that delegation is exclusive, and an assessment could not be made by the shareholders. The converse of this proposition is true also, that if this power to assess is delegated by Congress to the shareholders, then it was not within the power of the directors to levy this assessment, and their attempt to do so is null and void.

It is not contended by respondents that the board of directors are prohibited from transacting all powers "necessary to carry on the business of banking," but it is claimed that the board of directors can only exercise those powers designated in the act, viz: by Sub-division 6-7 of Section 5136 and by Section 5145; which is to merely conduct the ordinary banking business. All other powers are to be exercised by the association itself, except where, by the terms of the act some other officer or officers are specially mentioned as the agent of the bank, for the performance of any par-

ticular specified duty. Attention is called to the fact that by the act, above specified, national banks are defined as "associations." The powers granted to these banks is granted to them under the name of "association." At Section 5133 it is provided that "associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five." These natural persons are authorized to adopt articles of incorporation "not inconsistent with law." Under Section 5136 it is provided "upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power" to do those things thereafter enumerated. Section 5140 provides that "at least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business;" and further provides that the balance of the capital stock shall be paid in installments of not less than ten per cent per month thereafter, until the whole amount is paid. As heretofore stated, the name of this corporation in this statute is defined therein as "association," and these natural persons become an association by complying with the section above stated, and have power to sue and be sued before it is necessary to elect a board of directors. It is only necessary to elect a board of directors (Section 5145) "at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking."

LANGUAGE OF SECTION 5205 DIRECTS THE LEVY UNDER THAT SECTION TO BE MADE BY THE SHAREHOLDERS AND NOT BY THE DIRECTORS.

The language of the above section is that—

"Every association whose capital stock shall have become impaired by losses or otherwise, shall within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of the capital stock held by each. * * * If any such association shall fail to pay up its capital stock and shall refuse to go into liquidation, as provided by law, three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of Section 5234."

Section 5220 is as follows:

"Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

Under the above Section 5205, the levy is not to be made by the directors nor is it to be paid by them. The language of the statute is that the association shall make the levy and it is further provided that "if any such association shall fail to pay, a receiver shall be appointed," etc.

It has been already stated that words used in a statute will be presumed to have the same meaning throughout the statute, and this is the rule when used in any subsequent statute, referring to the same subject matter, unless by the terms of the statute they are given a different meaning. It is also held that where the statute defines a word and gives its meaning that it will be presmued that that meaning adheres to the word wherever used unless by the terms of the statute another meaning is given to it.

Assuming this proposition to be correct, is it not a legitimate argument to say that the word "association" in this statute must

have the same meaning wherever used in this particular section? If so, applying it to the two directions or commands in the statute, viz: First, the "association" shall levy; second, the association shall pay, have we not here a command for the association to do two things? And is it a legitimate argument to say that when a command is given to levy, it refers to the directors; but when a second command is to pay, it refers to the shareholders? For it probably will not be disputed by the appellant that it was not incumbent upon the directors to pay this assessment after they had made the levy. But appellant does not take that position. It says to this Court that when the statute commands the "association" to levy an assessment, that it is a command to the directors; but when the command is to the "association" to pay, that that does not mean the directors, but refers to the shareholders. So, according to appellant's contention, the word "association" in the first instance means directors, and the very same word in the second instance means "shareholders."

Is it reasonable to suppose that Congress intended that so important a duty as making a levy under this statute and thereby creating a banking fund as a condition of continuing business, should be decided by the board of directors, most of whom are not interested financially but merely hold nominal shares of stock in order to qualify them to be directors? Is it not more reasonable that this important duty is intended by Congress to be addressed to the men who have to pay—the men who are really interested: the shareholders? Under this section "every association * * * * shall within three months after receiving notice thereof from the Comptroller pay the deficiency in the capital stock. * * * * If any such association shall fail to pay up its capital

stock * * * three months after receiving notice * * * a receiver shall be appointed." etc. Here there are three alternatives presented, none of which come within the ordinary "affairs" of the bank:

1st.—Shall an assessment be made on the shareholders?

2nd.—Shall no assessment be made, and the bank be allowed to lapse by limitation in three months?

3rd.—Shall the bank be put into immediate liquidation under Section 5220, which says: "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

This alternative of making the assessment or go into liquidation is a matter of very great importance to the shareholders. In case the capital stock should be impaired, 100 per cent., it would be equivalent to creating a new bank. This impairment may have occurred by mismanagement of the affairs of the association of the bank by the directors. If so, should they be allowed to call upon the shareholders to rehabilitate the bank, so that their mismanagement should continue? Is it not apparent that this is a matter which addresses itself to the shareholders, the real owners of the bank, and is it not the right of every shareholder to have the shareholders called together in a meeting called for that purpose and have the affairs of the bank discussed, so that whatever action is taken may be as a result of the combined judgment of the shareholders, or at least a majority of them?

It is said in Section 706, Thompson on Corporations:

"It has been well said that the act of a *majority* of the corporators does not bind the *minority*, if it has not been ex-

pressed in the form pointed out by law; and accordingly, that the act of a majority expressed elsewhere than at a meeting of the stockholders, is not binding upon the corporation—as where the assent of each one is given separately and at different times. The reason is that each member has the right of *consultation* with the others, and that the minority has the right to be *heard*. In the line of authority establishing the foregoing principles, no break has been discovered; though it should be added that an election, or other proceedings had at a meeting irregularly assembled, may be valid if *all* attend and *act* or *assent*." See also Sections 3905-3908 inclusive.

I repeat that in the position taken by appellant, it is practically claimed that no deliberation of the real parties in interest was contemplated by the law-making power when provision for this assessment was provided for. Appellant's argument is, in effect, that while an alternative is presented to the owners of the bank to assess or go into liquidation, the real owners—shareholders—are only expected to consider one phase of this alternative, and even this has a limitation; because, if the board should refuse to make an assessment, the bank would have to close, so that in effect the board of directors decide both questions, assessment and liquidation. Appellant wants the Court to repeal Section 5220 of the Act, because, what use is that section, if the board of directors should decide against an assessment? Would not this close the bank? If the board of directors has a right to decide on the assessment, their decision either for or against it would be final. The right to decide this question could not be divided. It could not be decided by both the directors and the shareholders. Would not the directors, therefore, by deciding against the assessment, in reality pass upon both questions, assessment and liquidation? If they should decide not to assess, would not this close

the bank? What would be the object of the shareholders assembling to decide on the liquidation of the bank, when the directors had already decided, by refusing to assess, that the bank should go into liquidation? Again, if the directors should decide in favor of an assessment, what alternative would be left to the shareholders except to pay? When an assessment is made, there is no alternative; if the shareholder does not pay, his stock is sold, and he ceases to be a constituent member of the bank for the purpose of liquidation or otherwise, and thus the whole matter of assessment and liquidation is by the act of the board of directors removed from any consideration of the shareholders whatever.

Hulitt vs. Bell, 85 Fed. 98.

The Federal Court for the southern district of Ohio has construed this statute in the above case, and the conclusion there reached is adverse to appellant herein. In the above case two points are decided. The first is, that an assessment by the board of directors upon the shareholders, under Section 5205, is void. Second: That no action will lie in any event against the shareholder to recover the amount of the assessment, but the only remedy is the sale of the shareholder's stock. Both of these points are important in the discussion of the case at bar, for the reason that in deciding the second point, the Court makes it very clear that this assessment under the section above quoted, is not in any sense for the benefit of the creditors. The language of the judge is: "It may well be doubted whether the assessments provided for in Sections 5205 could be levied for the purpose of paying creditors," and if this be true it eliminates from this discussion the question of public policy in so far as it affects the creditors of the bank.

Delano vs. Butler, 118 U. S. 653.

The liability of a shareholder of a national bank to the creditors of the bank is independent of Section 5205 above quoted.

That liability is affected by Section 5151 and this Court has held that under that section (5151) a shareholder is liable, even though he has paid an assessment made under Section 5205.

Delano vs. Butler, 118 U. S. 634.

In other words, the shareholder's relation to his bank, under Section 5205, is entirely distinct and severable from his relation to the creditors of the bank under Section 5151. So that a shareholder might be assessed 100 per cent. a dozen times under Section 5205 and he might make a dozen payments, still, he would be liable in case of the failure of the bank to pay its creditors in his pro rata share of the debts up to 100 per cent. of his stock. Therefore, suppose the alternative is presented to either assess or go into liquidation, and if the directors can decide on the matter of assessment, the shareholder would be required to pay, and still if the bank should fail, he would be required to pay again in case the bank had not sufficient assets to pay its debts, and this, too, notwithstanding the fact that the law has given him, under Section 5205, the alternative of allowing the bank to be closed up, then if the assets do not meet the liabilities he would only be liable to the amount of 100 per cent. of his stock pro rata with the other stockholders.

In the case of Hulitt vs. Bell, the Court says: "They (referring to counsel for the defendant) claim that the language of the statute implies an election on the part of the association as to

the course it will adopt, and that this involves deliberation and the exercise of judgment on their part. My conclusion is that this claim is well founded and that it is essential to the validity of the assessment that it be made by the shareholders. * * * * The association is authorized under the 7th paragraph of Sec. 5136, 'to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carrying on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion, by lending money on personal security, and by obtaining, issuing and circulating notes according to the provisions of the statute.' The assessment in question does not fall within any of these powers; it does not come under the head of incidental powers necessary to carry on the business, nor is it included in the conduct of general business. It is a provision for a special emergency, so unusual and of such importance as to make it necessary for the association to consider and determine whether it will continue in business or wind up its affairs."

The language of the above case, in effect, holds that the word "association" as used in this section of the law, wherein the association is commanded to make an assessment, does not refer to the directors, and that the power of the corporation to make the assessment is delegated to the shareholders whose duty it is, in case the assessment is made, to pay the same.

It is no answer to this to say that this assessment may be made by a majority of the shareholders and in opposition to a minority thereof; because this is one of the conditions that every shareholder assents to when he subscribes for his stock. In order to make this

assessment binding upon him, however, he has the right to demand that all the shareholders associated with him in the bank shall meet in a meeting called for that purpose; that the matter shall be discussed; and that whatever conclusion is finally reached shall be the judgment of a majority of the shareholders, after the condition of the bank has been looked into, and all matters pertaining thereto have been duly considered. This decision of the shareholders is in the nature of a judicial investigation. It considers all conditions. Such a meeting would consider the causes of the impairment of capital; whether it was the fault of the directors or otherwise, and that every question of fault or cause of impairment would very largely affect ordinary business men in their action as to whether they should make the assessment or decide that the bank should go into liquidation and be closed up.

THE RIGHT TO ASSESS UNDER SECTION 5205 NOT A RESERVE FUND.

It was contended by plaintiff in error in the lower court that a shareholder in subscribing for his stock, by implication, consented to assessments under Section 5205, and that this assessment was for the purpose of a reserve fund which the shareholder could be called upon involuntarily to pay. That the power to compel this involuntary payment was vested in the directors. The answer to this is, that conceding Section 5205 is a covenant in the contract between the shareholder and the bank, the shareholder is not obligated beyond the covenant in the contract, i. e., the law. All that this law obligates the shareholder to do when notice is given of impairment of capital is to assess himself or to allow the corporation to go into liquidation and thereby lapse and terminate by limitation. It requires the shareholder to act, and the act to

be done is to exercise a choice as to which alternative he prefers. The law as a covenant in the contract does not require the shareholder to be assessed by somebody else. The assessment under Section 5205 is a voluntary assessment in contra-distinction to involuntary asesssment, as provided by Section 5151. If it be voluntary the alternative to assess or wind up the corporation is to the shareholder himself. It is the shareholder who is to act, and not the director. It was necessary for the shareholder to create a bank in order for the office of director to be created, and when the shareholders who create the bank see fit to terminate it, it terminates also the office of director, and therefore this power to assess under Section 5205 is in no sense a reserve fund that can be called upon by the directors of the bank. Any action taken by the directors concerning this assessment is absolutely void. The idea of plaintiff in error seems to be that this assessment is really but a "call" for something which the shareholders have promised absolutely to pay. The reply is that the shareholder has made no contract to pay, but has merely made a contract to do some alternative act, and that act is that he will at his own option either assess himself or allow the association to lapse by limitation, and this act is one which the shareholder himself is to do. It is a covenant in the contract of the shareholder. It is an act in personam. It is in no sense a covenant to which the director is a party. No action could be brought against a director in personam for the failure to comply with this contract. The only person that can be held is the party to the contract, and the party to the contract is the shareholder, and not the director. Therefore, the alternative is addressed to the shareholder, and not to the director. And this alternative gives the party to the contract, i. e., the shareholder, a choice of action. He is to pay or allow his bank to expire

by limitation. It is an alternative, and a party to a contract may always exercise an option as to which alternative of his contract he will take in performing same.

That this right to assess is not a reserve fund is apparent from the fact that there is no limitation upon the number of times the shareholders may be assessed under Section 5205. It is true that no one assessment could be greater than the face value of the stock, and it is also true that this assessment may occur as often as the capital is impaired. Therefore, suppose the capital in this bank had been impaired 100 per cent. instead of 50 per cent., and an assessment had been made to rehabilitate this capital. In that case the bank would continue to do business. But suppose the capital should be again impaired within six months or a year, then another assessment could be made. If the directors have the right to make this assessment they would also have the right to make a subsequent assessment upon notice that the capital was impaired, and the shareholder would have no remedy save and except to either pay his assessment or cease to be a stockholder in the bank. It is incredible that such power should be given to directors.

As said by Bean, C. J., in the opinion of this case (Weinhard Record, pages 50-51): "In our opinion, the language of the section plainly implies that, upon receiving such notice, the association may elect to either continue in business by increasing the amount of the investment, or go into voluntary or involuntary liquidation, and, as this question affects the shareholders alone, they, and not the directors, are entitled to determine the course that shall be pursued." * * * * If they desire and elect to continue in business they must make up the deficiency, but they are, in our

opinion, at liberty to take the other alternative and allow the corporation to go into liquidation."

BY WHOM VARIOUS POWERS OF NATIONAL BANKING ASSOCIATIONS MAY BE EXERCISED.

As previously stated, the only persons that may form a bank are "natural" persons, and in any case not less than five. Sec. 5133. In case it is desired to increase the capital stock of the bank this can only be done where it is provided for in the articles of incorporation. Sec. 5243 provides that the capital stock of an association may be reduced "by the vote of shareholders owning two-thirds of the capital stock." Sec. 5211 provides that an association shall make at least five reports to the Comptroller of the Currency each year, "Verified by the oath or affirmation of the president or cashier of said association and attested by the signature of at least three of the directors."

This is one of the things that the board of directors would not have power to do; but it must be done in the manner pointed out by the statute. So Sec. 5215 provides that an association shall make certain returns to the secretary or treasurer, but that it must be done through its president or cashier. Here is a duty that does not devolve upon the directors, and an act that the directors could not do. So that while Sec. 5145 provides: "The affairs of each association shall be managed by not less than five directors." The affairs of the association, here referred to, relate however, to the duties devolving upon the directors under Sec. 5136, hereinbefore referred to, and in any event are merely the ordinary control of the property of the bank—the funds or the assets thereof—and the conducting of the ordinary business which the bank is authorized to conduct, with its funds, assets and property, in the carrying

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out of the business for which the bank was organized. All other duties must be done by the shareholders.

ANALYSIS OF SOME OF APPELLANT'S CASES.

To sustain appellant's contention, counsel in the lower court cited a number of cases, and while it is not intended to review each of them, it is purposed to review each class, in so far, at least, as they are cited in reference to the powers of the board of directors. In Budd vs. Multnomah Street Ry., 15 Oregon, 413, the Court held that the directors had power under the Oregon Statute to make a "call" for an unpaid subscription of stock. This is merely another way of saying that it is within the power of directors to provide for the collection of money which by contract the shareholder has promised to pay to the corporation. It is in no sense a creation of a new fund, but is merely the collecting in of a fund subscribed by the stockholder in order that the purposes for which the corporation is formed may be carried out. Apropos of this discussion, however, it may be well to call attention to the peculiar language of the Oregon Code with reference to directors. The Oregon Statute, which is the basis of all powers in corporations organized within the state, at Section 3225, Hills' Annotated Code, provides "that from the first meeting of the directors, the 'powers' vested in the corporation are exercised by them, or by their officers or agents under their direction, except as otherwise specially provided in this chapter." Compare this with the National Banking Act, and especially Section 5145, which says: "The affairs of each association shall be managed by not less than five directors," and then by reference to Section 5136 of this act, it will be seen that the language is very different in the grant of powers to directors by the Oregon Code. In the National Bank-

ing Act the "affairs" of the bank are to be conducted by the directors and these affairs are specially enumerated in Sub-division 6-7 of Section 5136. But in the Oregon Code, the "powers vested in the corporation" are to be exercised by the board of directors. It would not be profitable to speculate on the full scope of this provision of the Oregon law, but in any event it is certain that whatever powers a corporation has, shall be exercised by the board of directors "except as otherwise provided in this chapter." It is clear, however, that the powers granted to directors under this peculiar statute of Oregon cannot be attributed by analogy to those granted to the board of directors under the National Banking Act, which latter act prescribes the duties of directors in a much more limited language than that used in the Oregon Act.

McCullough vs. Moss, 5 Denio, 575.

In this case it was held under a special act incorporating a company, where, by its charter, the board of directors were invested "with the power to manage the concerns of a corporation" that a resolution of the stockholders, without the action of the board, could not bind the corporation on a note made by the officers of the company. The Court holding that under the above language defining the duties of the board of directors, the ordinary management of the corporation in the transaction of its ordinary business was reposed in the directors and that the signing of a note in the ordinary course of business came within the scope of the duties to be performed by the directors and very properly held that the management of the "affairs" of the bank could not be divided, and therefore held that those powers which are to be performed by the board of directors could not also be performed by the shareholders.

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In re. Excelsior Ins. Co., 38 Barbour, 297.

In this case by special act an insurance company was incorporated with 40 directors. Subsequently thereto an amendatory act was passed reducing the directory from 40 directors to 21 directors. It was held that the power of reducing the directory to 21 members, under an amendatory act, was in the directory itself, and where this duty was undertaken to be performed by the stockholders and in pursuance thereof only 21 of the directors were elected, the Court would not hold such election illegal and set same aside. The 21 directors being a majority of the board and therefore capable of transacting business. This case merely interprets the particular charter, and the division of powers thereunder.

Hutchinson vs. Greene, 91 Mo. 367.

This case merely holds that under a statute creating corporations which provided that "the property or business of the corporation shall be conducted and managed by the directors." It was within the power of the board to use the property of the corporation to pay its debts, and therefore in pursuance of this duty when a corporation became insolvent, that it was within the power of the board to make an assignment for the benefit of the creditors. It would seem to be too plain for argument that where the affairs of a corporation are in the hands of a board of directors whose duty it is to conduct same, that one of the first duties which the board owes to the public is the payment of the corporate debts, and the board would have the right to use the property of the corporation, whether it was solvent or insolvent, for that purpose. But where the corporation was insolvent, as in the case above quoted, it was not only within the powers of the board of directors, but its duty, to make an assignment for the benefit of the creditors,

to the end that each creditor should receive his pro rata share of the assets. Many of the cases cited by counsel for appellant are cases holding that the board of directors have authority to make assignments for the benefit of creditors, but the assignment for the benefit of creditors is a very different affair than the creating of a fund for the purpose of conducting the business of a banking corporation whose charter had expired by limitation and where it was necessary to create a new fund in order to extend the life of the bank.

Louisville Trust Co. vs. Louisville Ry., 75 Fed. 448.

This case holds that where a statute allowed a corporation to "guarantee bonds upon the petition of the holders of a majority of the stock of said railway company," and where the board of directors had guaranteed negotiable bonds without a petition of the stockholders and these bonds had passed into the hands of an innocent holder, the innocent holder was entitled to enforce payment thereof against the guaranteeing corporation, notwithstanding the irregularity in the manner of the guarantee. The doctrine of this case therefore is, that where a corporation has the power to guarantee negotiable bonds, an innocent purchaser thereof may rely upon the presumption that in the exercise of that power the corporation has done the same in the manner required by its charter. In Oregon this presumption would probably follow as a matter of statutory enactment. Code. Sec. 776, Sub-division 15-19-20.

It will be seen by investigation of these cases cited by counsel that the Courts, in construing the powers of a corporation or the manner of the exercise thereof, follow the provisions of a particular charter under consideration. In fact, no corporation case can

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be found where this is not the rule, because all corporations are either the result of special acts creating them or of general acts defining their powers. It is contended here by appellant that the National Banking Act gave the board of directors the power to make this assessment. This is equivalent to saying that it is within the power of the directors to enlarge the fund of the bank and thereby change the status of the stockholder by placing his stock upon a different basis than that assumed by him when he made his subscription. It takes away from the shareholder all alternative as to whether or not when the capital of the national bank is impaired it is advisable to repair the capital or go into liquidation.

The contention of respondents is that under Section 5205 of the National Banking Act the board of directors have no authority or power to make an assessment on the stock of the shareholder and the attempt in this case to do so, was null and void. That the action of the bank in selling respondents' stock was a conversion thereof for which the appellant is liable, and the decision of the Supreme Court to that effect is right and should be affirmed.

Respectfully submitted,

Geo. H. Williams,

Attorney for Respondents.

Thos. O'Day,

Of Counsel.

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Supreme Court of the United States.

Nos. 109 and 110.—October Term, 1903.

Commercial National Bank of Portland, Plaintiff in Error, 109 *vs.* Henry Weinhard.	In error to the Supreme Court of the State of Oregon.
Commercial National Bank of Portland, Plaintiff in Error, 110 *vs.* George H. Williams.	

[January 18, 1904.]

These actions were brought in the Circuit Court of the State of Oregon for Multnomah County upon separate demands to recover the value of stock severally held by Weinhard and Williams in the Commercial National Bank of Portland, Oregon; Williams owning sixty shares of the par value of $6,000, and Weinhard one hundred shares of the par value of $10,000. By stipulation the cases were heard together in the Circuit Court; a jury being waived and a trial had to the court. The cases were considered together as one appeal in the Supreme Court of Oregon, which affirmed the judgment of the lower court, (41 Oregon, 359,) assessing the value of the stock and giving judgment in favor of the plaintiffs, now defendants in error. The same facts and questions are involved in the cases and they will be considered together. The one question arises from a motion on the part of the bank for nonsuit, on the ground that the plaintiffs below had introduced no testimony, as a part of the case in chief, tending to show the value of the stock for which a recovery was sought. As appears in the record much testimony was taken, and the Oregon Supreme Court regarding the stock as of some value, at least, it was held that if there was any error in overruling the motion for nonsuit, it was cured by the subsequent action in submitting testimony as to the value of the stock. In any event this feature of the case does not present a Federal question, and upon writ of error from the judgment of a State court we are to consider in the first instance only the Federal questions involved. If those were correctly decided the judgment must be affirmed. (*Murdock* v. *City of Memphis*, 20 Wall. 590.) The plaintiffs below recovered judgment for the value of the stock upon the theory that there had been a conversion thereof, because the board of directors and the stockholders directed the assessment resulting in the sale of the stock of the plaintiffs below in satisfaction thereof.

The Commercial National Bank of Portland was duly organized under the National Banking Act, and carried on business in the city of Portland, Oregon. It appeared that the capital of the bank had become impaired, and thereupon such proceedings were had that on December 5, 1896, the Comptroller issued the following notice to the bank:

"Treasury Department,
Office of Comptroller of the Currency,
Washington, D. C., Dec. 5, 1896.

"Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial National Bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency:

"Now, therefore, notice is hereby given to said association, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,
Comptroller of the Currency.

To the Commercial National Bank, Portland, Oregon."

After receipt of this notice, upon December 12, 1896, the board of directors passed this resolution:

"*Resolved*, That in accordance with the notice served upon this association by the Comptroller of the Currency, under date of December 5, 1896, and received by this bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this bank of fifty per cent or $50 per share, payable at this bank on or before March 11, 1897.

"*And, resolved*, That the cashier of this bank be, and he hereby is, authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail."

Upon December 17, 1896, notice of this assessment was served upon each of the stockholders of the bank. The defendants in error having failed to pay this assessment, on March 18, 1897, the board of directors passed a resolution directing the sale of the delinquents' stock to be made at public auction on May 5, 1897. In pursuance of this order, and on the day named, the stock was sold for the amount of the assessment. The Federal question is whether the board of directors in thus assessing and selling the stock of

the defendants in error exceeded their powers under the National Banking Act; it being claimed that a valid assessment could only be made by the action of the stockholders, and that the sale by the directors upon this assessment was unlawful and amounted to a conversion of the stock.

Mr. Justice DAY delivered the opinion of the Court.

This case requires the construction of section 5205 of the Revised Statutes of the United States as amended. (3 Comp. Stat. 3495.) The section is as follows,

"Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

The assessment in this case was made by the board of directors without any action of the stockholders of the association, and the defendants in error having failed to pay the same upon notice, their stock was sold as directed in the statute. It is claimed that an assessment by the directors without action of the stockholders was without authority of law and amounted to a conversion of the stock. This view was sustained in the Supreme Court of Oregon. The assessment ordered by the Comptroller was for the purpose of restoring the capital of the bank, and thus enabling it to continue its business. Ample power is conferred upon the Comptroller for this purpose. His action is in aid of other sections of the law preventing a withdrawal of the capital, or the making of dividends when losses have been sustained equal to the undivided profits. (Sections 5202–5204, Rev. Stat.) When the notice is received from the Comptroller by the bank under section 5205, the association has no authority to review or

gainsay the necessity thereof. That question is concluded by the action of the Comptroller. The money to be raised for the continuance of the business may or may not be used in the liquidation of debts. The assessment is entirely different from that provided for in section 5151, calling upon the individual responsibility of shareholders for the payment of debts. Under the last named section the stockholder is required to pay such assessments as may be made, to meet the outstanding obligations of the bank, within the limit of an amount equal to the par value of the stock in addition to the amount invested therein. He has no election of payment, but is required to meet this liability, created by law for the benefit of creditors. Under section 5205 the amount paid is subject to the control of the board of directors in the continued operations of the bank. If the stockholders are to have a voice in making or declining to make the assessment, they may well hesitate to entrust more capital to the control of a board under whose management it has already been impaired. Certain powers are conferred by law upon the directors.

Section 5136 provides that the association shall have power—

"*Sixth.* To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"*Seventh.* To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

And, again, by section 5145, it is declared that the "affairs" of the corporation "shall be managed by not less than five directors."

Thus the directors are given authority to transact the usual and ordinary business of national banks. Obviously, the power conferred may be exercised in all usual transactions through the executive officers of the bank without consultation with the stockholders. In the present case the question to be dealt with is vital to the continuance of the life of the association, as only by complying with the requirement of the Comptroller in assessing a sum sufficient to make up the impaired capital of the bank can its business be continued. The shareholders by their contracts of subscription have agreed to pay in the amount of capital stock subscribed and to discharge the additional liability imposed by the statute. They have not contracted to meet assessments at the will of the directors to perpetuate the business of a possibly losing concern It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corpora-

tion. Corporate powers conferred upon a board of directors usually refer to the ordinary business transactions of the corporation. (*Railway Company* v. *Allerton*, 18 Wall. 233.) The assessment is required by the Comptroller, not by the directors. The association is to receive notice thereof, and action must be taken by the association to meet the requirements of the Comptroller under the statute. It is provided that if the association fail to pay up its capital stock, and refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association according to the provisions of section 5234. This important provision is entitled to much weight in determining the proper construction of the statute. The assessment may be avoided, and the amount required is not payable if the association decides to go into liquidation. Provision for voluntary liquidation is made in section 5220, wherein authority is given to liquidate upon a vote of shareholders owning two-thirds of the stock. Such liquidation does not prevent the assessment of stockholders under section 5151 for the benfit of creditors and the enforcement of the liability of the shareholders in an action by a receiver or directly by the creditors. (Comp. Stat. sec. 5334; sec. 2, Act of June 30, 1876, as amended 3 Comp. Stat. 3509.) The section referred to (5234) directs the appointment of a receiver to take possession of the books, records and assets of the association, to collect the debts and claims belonging to it, and, among other things, if necessary to pay the debts of the association, to enforce the individual liability of the shareholders.

We are of opinion that section 5205 is intended to and does confer upon the association the privilege of declining to make the assessment to make good the deficiency to the capital, and to elect instead to wind up the business of the bank under section 5220, which provides for voluntary liquidation by a vote of two-thirds of the shareholders. The question is, who shall exercise this privilege and determine the future of the association—is it the directors or the shareholders who have this right of decision? The origin and continuation of the association would seem to be matters in which the owners and not the managers of the bank are primarily interested. If these are privileges of the shareholders and only exercisable by them, this case presents a total lack of the exertion of the power by those upon whom it is legally conferred, as no action of the shareholders was had in the present case in making the assessment. Action upon the Comptroller's order involves extraordinary action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards and not conferred by

statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act. In certain instances the law specifically requires the action of the association to be taken by its incorporators or shareholders. (Sections 5133, 5134, 5136, 5143, Rev. Stat.) These sections regulate matters not pertaining to the ordinary business of the bank entrusted to the directors. They deal with the exercise of those powers which concern the organization of the corporation, the amount of its capital stock and kindred matters.

In section 5205 the requirement of the Comptroller is that the association make the assessment. It is the "association" which is required to pay up the stock or go into liquidation. The payment of the assessments must come from the shareholders, and we are of the opinion that the statute contemplates action upon the alternatives presented in the statute by the association composed of its shareholders. It is true, as suggested by the learned counsel for the plaintiff in error, that it requires a two-thirds vote of the stockholders to put the bank into liquidation under section 5220; but if the assessment is not carried, and the shareholders have not a two-thirds vote favoring liquidation, the bank is put in liquidation, and the shareholders' liability is the statutory one for the benefit of creditors, and not a venture of more capital in the enterprise with a possible stockholders' liability upon the liquidation of the bank if it shall ultimately fail. Again, if the determination of this matter is entirely left to the directors, they may, by declining to make the assessment, force a liquidation of the bank, although the shareholders—the real owners of the property—be willing to make good the impaired capital and continue the business. On the other hand, if the directors may assess to make good impaired capital, the shareholder must pay the assessment or submit to the sale of his stock. Such extraordinary powers are far beyond those required in the management of the bank's affairs or conferred in the sections of the law defining those conferred upon the directors. In *Delano* v. *Bank*, (118 U. S. 634, 653,) while the question was not directly involved, in speaking of assessments under the act, Mr. Justice Matthews, delivering the opinion of the court, said:

"The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under section 5205 of the Revised Statutes, is not the assessment contemplated by section 5151, by which the shareholders of every national banking association may be compelled to discharge their individual responsibility for the contracts, debts and engagements of the association. The assessment as made under section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment of the capital stock, and disposed of by its officers in the ordinary course of

its business. It may or may not be applied by them to the payment of creditors, and, in the ordinary course of business, certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably: whereas, under section 5151, the individual liability does not arise, except in cases of liquidation, and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably."

We concur in this reasoning. The assessment under section 5202 provides for a sum to continue the operations of the bank and if unpaid subjects the stock of the shareholders to sale to make good the deficiency in its collection. Shareholders are given the right to go into liquidation, subjecting themselves, it is true, to the liability of the assessment for the benefit of creditors under section 5151 to an amount equal to the par value of their stock, if needed to make good the indebtedness of the bank, but risking no further investment of new capital in the continued business of the bank. The choice of methods is with the shareholders, and to them is addressed the decision of the question and the making of the assessment if that course is determined upon. (*Hulitt* v. *Bell*, 85 Fed. Rep. 88.) In the present case the assessment was made by the directors without action by the shareholders, and, not being within the statute, was void. It follows that the Supreme Court of Oregon properly affirmed the judgment of the lower court in which the value of the stock sold was recovered.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.